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Brief of Clark & Russell for P. C.

SUPREME COURT OF THE UNITED STATES

Filed May 8, 1899.

THE PITTSBURGH and LAKE ANGELINE IRON COMPANY,
vs.
THE CLEVELAND IRON MINING COMPANY and THE LAKE SUPERIOR IRON COMPANY.

778

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF FOR COMPLAINANT

Resisting Motion to Dismiss Writ of Error.

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Solicitor for Complainant.
ALFRED RUSSELL,
Of Counsel.

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IN THE SUPREME COURT OF THE UNITED STATES.

THE PITTSBURGH and LAKE ANGELINE IRON COMPANY,
Complainant in Error,
vs.
THE CLEVELAND IRON MINING COMPANY and THE LAKE SUPERIOR IRON COMPANY,
Defendants in Error.

BRIEF FOR COMPLAINANT

ON MOTION TO DISMISS WRIT OF ERROR.

I.

Notice of this motion and of the hearing on the 8th of May, 1899, was served upon us at Marquette, Michigan April 19th, 1899, as appears from the admission of service endorsed thereon. This notice was not in conformity with section 4, rule 6, which requires that it shall be served "at least three weeks before the time fixed for submitting the motion". We therefore insist that this motion is not regularly for hearing, and should not be considered by the court; and should not be considered for the further reason that the defendant has not prepared a printed record for use on this motion.

The complainant, and the defendants are mining corporations organized under the laws of Michigan operating iron mines in Marquette county in that state, in the iron district of Lake Superior. These corporations acquired title to all the government frac-

tional lots surrounding a small inland lake, which covers an area of about 150 acres, and is located in sections ten (10), eleven (11), and fifteen (15), township forty-seven (47) north, range twenty-seven (27) west, and known as Lake Angeline, and is as shown by a small sketch on page 59 of the Record in the court below; and as shown on Exhibits C and E, which are certified copies of the governmental maps, with accompanying government field notes of the meander courses and distances around the lake. The last mentioned maps, appear in said record between the pages 58 and 59. A duplicate of the first named sketch, showing the entire lake is below:

Paragraphs 5, 6, and 7 of said bill allege, that the complainant acquired title to the government lots 2, 3, 4 and 5 in said section 15, by mesne conveyance from William Pettit, John Burt and others, who were patentees from the government. William Pettit's patent of a portion of the territory was dated 1852. John Burt's patent was dated the 3rd of September, 1853. These facts are not contradicted. See pages 9 to 14 of said Record.

Defendant The Lake Superior Iron Company acquired title by mesne conveyances from Isaiah Briggs, patentee. Briggs' patent was dated May 2, 1851. See pages 1 to 5 of said Record.

The Cleveland Iron Mining Company, defendant, acquired title by mesne conveyance from Lorenzo D. Burnell, who received patent from the government July 2, 1850. See pages 5 to 7 of said Record.

The conveyances mentioned above transferred to the complainat lots 2, 3, 4 and 5 of section 15; to the defendant The Lake Superior Iron Company lots 4, 5 and 6, and the northwest quarter of the southwest quarter of section 10; to the defendant The Cleveland Iron Mining Company lots 2, 3 and 7 of the southeast quarter of section 10; and lot 1 of the southwest quarter of the southwest quarter of section 11: and the balance of the upland in the east half of 10 and the west half of 11; all in township 47 north range 27 west. These ownerships, so far as *upland* is concerned are not in dispute.

II.

Federal Questions Involved.

The complainant alleged, in the fifth paragraph of its bill of complaint, that it acquired title to the land

described as "fractional" lot 5, section 15, township 47 north, range 27 west, through a patent from the United States government issued to John Burt, dated September 3, 1853, and mesne conveyances to it. That it also acquired title to land described as "fractional" lots 3 and 4 in said section 15, issued to William Pettit by the United States government, and mesne conveyances to it. That it also acquired title to lot 2 in said township and range in similar manner from the United States government and mesne conveyance to it. That said lots were surveyed by the United States government as "fractional", and had a frontage on a small inland lake known as Lake Angeline. And that it acquired title to the centre of said lake to the land thereunder, as riparian owner, in proportion to its shore frontage. See paragraphs 5, 6, 7 of bill.

The Cleveland Iron Mining Company in its answer alleged, that it was, by virtue of a United States patent to Lorenzo D. Burnell and mesne conveyances to itself, the owner of a large portion of the said territory claimed by complainant, as riparian owner, under said lake, as alleged. The Cleveland Iron Mining Company "alleged, in paragraph four of its answer, that: "It was "the intention of the government, to convey to the said "Lorenzo D. Burnell, through whose patent it claimed "the entire east half of section 10, and the entire west "half of section 11, described in the bill, *to the full ex-"tent and limit of section* line of said section, as bound-"ed on the west by the north and south center line of section 10, and on the east by the north and south "center line of section 11, *and on the south by the south "section line of sections 10 and 11, regardless of the "meander line of said Lake Angeline.* That it was the "intention of both the government and the grantee, "under and by virtue of the terms of said patent,

"that the patentees should have the *full limit of said "two half sections, as aforesaid*".

Thus, the complainant alleged, ownership of about *thirty acres* of land formerly under the waters of said lake, opposite its shore frontage, and lying north of the south line of section 10 (if extended through the lake), as riparian owner, and that said ownership extended to the center of the lake.

The defendant, The Cleveland Iron Mining Company in its answer denied your petitioner's ownership of said territory north of the south line of section ten (10) to the center of the lake, and asserted its ownership, of all the land under the waters of the lake, claimed by the complainant, and north of the south line of section 10 projected east and west through the lake. Said defendant claiming to own the same under the Burnell patent and mesne conveyances to it as above stated. Thus, by said pleadings there was alleged conflict of title between the complainant and the defendant The Cleveland Iron Mining Company, arising under *conflicting patents* from the United States.

It will be noticed by examining the plat on page 59 of the said Record, and the one appearing in this brief, that the "east half of section 10 and the west half of section 11" as described in the Burnell patent, under which The Cleveland Iron Mining Company claimed title, would cover a large portion of the territory of the lake lying south of the center of the lake, and down to the place where the south line of section 10, if extended east and west, would pass laterally through the waters of the lake, leaving but a small portion of the lake for the complainant, as purchaser of the government lots south of the lake; in fact only a small arm thereof lying south of the south line of section 10.

Thus, title to about *thirty acres* of mining territory

under the lake from its center to the south line of section 10 projected east and west through the lake, was in dispute in said cause.

The pleadings assert conflicting ownership acquired from the government through the United States patents, and present the federal questions involved in the case, viz: did the complainant acquire title, by virtue of its ownership of said government lots 2, 3, 4 and 5, to the land under the lake and to its center, or, did The Cleveland Iron Mining Company, defendant, acquire title by virtue of its patent, to a point where the south line of section 10, if projected east and west through the waters of the lake, would run?

It appears that the patentees, through whom the complainant acquired title, received their patents, describing the lands purchased, either as lots 2, 3, 4 and 5 of section 15, or described as fractional portions of the section. In fact, the patents referred to the lots in describing them as "fractional" lots, containing a certain acreage. See pages ~~52~~ 32 to ~~57~~ 37 of said Record. Whereas, the patent to Burnell referred to, through whom the defemdant The Cleveland Iron Mining Company claims, contains the following description of the land conveyed, "the east half of section 10 and the west half of section 11, in township 47 north of range 27 west", according to the official plat of the United States government (see pages ~~57~~ 37 and ~~59~~ 39 of said Record).

Under the pleadings and proofs, with this federal question thus presented, under the issue stated, the supreme court of Michigan specifically passed upon this *fundamental federal question* in the following language: "*The Cleveland Iron Mining Company claimed* "*title by virtue of the original patent.* Complainant "*owned no specific piece of land north of the section line,* "even under its own theory, which could be measured

"by metes and bounds. How much, if any, it owned "could only be determined by agreement, or the decree "of a court of equity."

As will be noticed, this is a direct determination of the federal question involved, as to titles, acquired by conflicting patents under the laws of the United States and is not only a federal question, but a fundamental one upon which all other determinations of the court rest.

With all due respect for that distinguished court, we say its holding is erroneous, because the abutting owners either acquired title to the center of the lake, by virtue of the riparian rights appurtenant to their abutting ownership, by virtue of the law of the United States, or they did not. If they did acquire such real estate title the *limits* of the ownership could be fixed by metes and bounds; *or disputed methods of locating* those metes and bounds, could be *settled* by the judgment or decree of a court; where all disputes as to ownership must be settled either in a court of law or equity in some form, if not amicably adjusted by litigants; and the *fundamental error* of the supreme court of Michigan is, that it held, that "The Cleveland Iron Mining Company claimed title by virtue of the orig- "inal patent. Complainant *owned no specific piece of "land north of the section line,"* etc. Thus, holding title in The Cleveland Iron Mining Company, and *no title* in the complainant, as to the disputed territory. This is the real issue in this case; all other conclusions of the court rest upon it.

Counsel for the defendant, The Cleveland Iron Mining Company, present no argument and cite no authorities to show that these facts do not present a *federal* question. They confine themselves to the simple statement on page 7 of their brief, that "we do not

think any federal question exists in this case". That there is a conflict between the United States patents there is no doubt. That this conflict on this federal question was the *fundamental* controversy, as shown by pleadings and proofs there can be no doubt, and it seems clear to us that where such issues exist in the supreme court of a state, and are passed upon as the fundamental determination of the entire controversy, the right of removal to the supreme court of the United States exists, under Section 709 of the Revised Statutes of the United States, which provides: "Where "*any title, right*, privilege or immunity *is claimed* "under the constitution of any treaty or statute of or "commission held, or authority exercised under the "United States, and the decision is against the title. "right, privilege or immunity especially set up or "claimed by either party under such treaty, statute, "commission or authority, may be re-examined and re-"versed or affirmed in the supreme court upon writ of "error," etc.

The case of Shively v. Bowlby, 152 U. S. 10 is a case directly in point, as to *riparian ownership*, as well as to the right of review in the supreme court of the United States by writ of error to the supreme court of a state. In that case Mr. Justice Gray, delivering the opinion of the court, held:

"This case concerns the *title to certain lands below* "*high water mark* in the Columbia River, in the state "of Oregon. The defendant below, now plaintiff in 'error, claimed under United States, and the plaintiff "below, now defendant in error, claimed under the "state of Oregon. * * The judgment against its validity "proceeded upon the ground, that the grant from the "United States, upon which it was founded, passed "*no title* or right as against subsequent deed from the

"state *in lands below high water mark. This is a di-*
"*rect adjudication against the validity of a right or*
"*privilege, claimed under a law of the United States;*
"*and presents a federal question within the appellate*
"*jurisdiction of this court.* Revised Statutes, Sec. 709.
"That jurisdiction has been repeatedly exercised, with-
"out objection or doubt, in similar cases of writs of
"error to the state court. St. Paul & P. R. Co. v.
"Schurmeir, 71 U. S. 7 Wall. 272; Packard v. Bird,
"173 U. S. 661; Knight v. U. S. Land Association,
"142 U. S. 161. In that case the supreme court of
"Oregon held that the complainant owned no specific
"title by virtue of riparian rights." The supreme court of Michigan, as we have pointed out under similar conditions, has held the same thing in this case that *complainant "owned no specific piece of land north of the section line"* (see 76 Northwestern Reporter, page 403).

The cases are very similar, as will be noticed, and the right of review on writ of error was sustained by the supreme court of the United States.

Our claim asserted in the bill of complaint, and in the proof is, that the complainant acquired title to the land under the lake to its center, by virtue of its abutting ownership, and we not only assert this in the allegations of the bill, but in the map Exhibit A attached to the bill of complaint, and appearing between pages 24 and 25 of said record; we pointed out specifically by metes and bounds the territory claimed by complainant; and in Exhibit A we specifically point out how by convergent lines to a common center, by our theory, an equitable designation of border lines of division can be established, so as to give a relative portion of the territory formerly covered covered by the lake in proportion to shore ownership. Whether

we are right as to that, and where those lines shall *equitably* be placed is of course for the court to determine.

In the case of Murdock v. Myer and others, 87 U. S. 20 Wall, 590, and succeeding pages, it was held: "It "has been many times decided by this court, on mo- "tions to dismiss this class of cases for want of juris- "diction, that if it appears from the record that the "complainant in error *raised and presented to the court "by pleadings, prayer for instruction, or other appro- "priate method, one of the questions specified in the "statute, and the court ruled against him, the jurisdic- "tion of this court attached, and we must hear the case "on its merits.*"

Rector v. Ashley, 6 Wall. 142.
Bridge Proprietor v. Hoboken Co., 1 Wall. 116.
Fireman v. Nichol, 8 Wall. 44.
Armstrong v. Treasurer, 16 Peters 281.
Crowell v. Randall, 10 Peters, 368.

It is clear from the language of section 709 of the Revised Statutes of the United States, that the right to a writ of error from the supreme court of the United States to the supreme court of the state, exist whenever a right or title is asserted or claimed, and set up by either party under the statutes or decisions of the United States or under its authority.

"A federal question is presented, when there is in- "volved a controversy as *to riparian rights, acquired "under the laws of the United States.*" A case arises "under the laws of the United States when its correct "decision depends on the construction of the United "States law."

Cohens v. Virginia, 6 Wheat. 264, 379.

"*What a land patent conveys, is clearly a question of "United States law;* and upon this the court is to pass, "and its decision may be reviewed under the 25th sec-

"tion of the Judiciary Act. The principle has been "repeatedly recognized, 'that when the question in any "'court, *state* or federal, *is whether the title to land, which* "'*had once been the property of the United States, has* "'*passed, that question must be resolved by the laws of* "'*the United States*'."

Wilcox v. Jackson, 13 Peters 517.
Page v. Peters, 70 Wis. 182.
Wisconsin Central Ry. Co. v. Wisconsin P. Land Co., 71 Wis. 99.

In the case of Saward v. Denney, Vol. 158 U. S. 180-183, Chief Justice Fuller stated this jurisdictional question as follows:

"1. The certificate of the presiding judge of the state court as to the *existence* of grounds, upon which our interposition might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below.

"Powell v. Brunswick County Board of Supervisors, 150 U. S. 433, 439.

"2. That the title, right, privilege or immunity must be *specifically set up, or claimed* at the proper time and in the proper way.

"Miller v. Texas, 153 U. S. 535.
"Morrison v. Watson, 154 U. S. 111.

"3. That such claim cannot be recognized as properly made, when made for the first time in a petition for rehearing after judgment.

"Loever v. Schroeder, 149 U. S. 580, 585.

"4. That the petition for the writ of error forms no part of the record upon which the action is taken here.

"Butler v. Gage. 138 U. S. 52.

"5. Nor do the arguments of counsel, *though the opinion of the state courts are now made such by rule.*

"Gibson v. Schouteau, 75 U. S. 314.
"Parmalee v. Lawrence, 78 U. S. 36.
"Ross v. U. S. M. Co., 108 U. S. 447, 484.
"U. S. v. Taylor, 147 U. S. 695, 700.

"6. The right on which the party relies must have been called to the attention of the court in some proper way, and the decision of the court must have been against the right claimed.

"Hoyt v. Thompson, 66 U. S. 518.
"Maxwell v. Neubold, 59 U. S. 18, How. 515.

"7. *Or, at all events, it must appear from the record, by clear and necessary intendment, that the federal question was directly involved, so that the state court could not have given judgment without deciding it. That is a definite issue, as the possession of the right must be distinctly deducible from the record,* before the state court can be held to have disposed of such federal question by its decision.

"Powell v. Brunswick County Board of Supervisors, 150 U. S. 433, 439."

We say, tested by these principles so clearly stated by the Chief Justice, that both by pleadings and by proofs, and by a clear determination of the supreme court of Michigan, upon the issue thus raised, a federal question was not only presented by the pleadings, and passed upon by the supreme court of Michigan, but that this federal question thus presented and determined was the basis of the entire opinion; that is, of all the *determining conclusions* of the supreme court of Michigan, which defeated the title of complainant in that court.

As supporting the above opinion of Chief Justice Fuller, see:

Baldwin v. Kansas, 129 U. S. 52, 56.
Kaukana W. P. Co. v. Green Bay & M. Canal Co., 142 U. S. 254.

Chicago & North Western Railway Co. v. Chicago, 164 U. S. 454, 457.
Chicago & R. Co. v. Chicago, 166 U. S. 226, 230, 242.
Oakley Stave Co. v. Butler County, 166 U. S. 648, 653, 654, 660.
Levy v. Superior, 167 U. S. 175, 177.

"A judgment which *rejects the claim, but avoids all "reference to it, is as much against the party's right, "within the meaning of Sec. 709, as if it had been spe- "cifically referred to, and the right directly refused.*"

Chapman v. Goodneau, 123 U. S. 511, 548.
O'Neil v. Vermont, 144 U. S. 323, 358.

"And if the decision of the supreme court of a state "is against the plaintiff in error, *and must necessarily "have involved a federal question, duly claimed in the "state court, the jurisdiction of this court exists to re- "view the case.*"

III.

Complainant Acquired Title to Center of the Lake.

It is established beyond controversy by the United States courts, that the abutting owner on an inland lake or river not navigable, acquires title *to its center;* though he pays only for the upland, according to the survey of the surveyor general.

In the case of St. Paul & Pacific Railway Co. et al v. Schurmeier, 7 Wall. 272, it was held as follows: "Meander lines are run in surveying *fractional* por- "tions of the public lands, bordering upon navigable "rivers, not as boundaries of the tract, but for the pur-

"pose of defining the sinuosities of the banks of the "stream, and as the means of ascertaining the quantity "of the land in the fraction subject to sale, and which "is *to be paid for* by the purchaser * * * Propri- "etors bordering on streams not navigable, *unless re- "stricted by the terms of their grant, hold to the center of "the stream;* but the better opinion is, that the propri- "etors of lands bordering on *navigable* rivers under "titles derived from the United States, hold only to "the stream, as the express provision is that all such "rivers shall be deemed to be and remain public high- "ways. Grants of land bounded on rivers above tide "water, says Chancellor Kent, carry the exclusive "right and title of the grantee *to the center* of the "stream, unless the terms of the grant clearly denote "the intention to stop at the edge or margin of the "river; and the public in cases where the river is nav- "igable for boats and rafts, have an easement thereon, "or a right of passage, subject to the jus publicum as "a public highway. 3 Kent's Com., 11 Edition 427. "The views of the comentator are, that it would require "an *express exception* in the grant, or some clear or un- "equivocable declaration, or certain and immemorial "usage, *to limit* the title of the riparian owner to the "edge of the river, because as the comentator insists, "the stream when used in a grant as a boundary, is "used as an entirety to the center of it, and he conse- "quently holds, that the fee passes to that extent. "Decided cases of the highest authority affirm that "doctrine; and it must doubtless be deemed correct in "most all jurisdictions, where the rules of the common "law prevail; as understood in the parent country. "Except in one or two states, those rules have been "adopted in this country, as applied to rivers not nav- "igable, when named in a grant or deed, as a boundary

"to land. Subsequently the same rules were adopted "by congress, as applied to streams not navigable; but "many acts of congress have provided, that all navig- "able rivers or streams in the territory of the United "States offered for sale, should be deemed to be and "remain public highways.

1st Statute at Large, 491.
2nd Statute at Large, 235, 279, 642, 666, 703, 747.
3d Statute at Large, 349.

" * * * Extended discussion of this topic, how- "ever, is unnecessary, as the court decides to place the "decision in this case, upon the several acts of congress, "making provision for the survey and sale of the pub- "lic lands, bordering on public navigable rivers; and "the legal construction of the patents issued under "such official surveys, and sale of such lands, must "have the same effect, as it would be entitled to receive "if it were incorporated into the patent, especially as "there is nothing in the field notes, nor in the official "plat or patent inconsistent with that explicit reserva- "tion * * * Viewed in the light of these construc- "tions, the court does not hesitate to decide, that "congress, in making a *distiction between streams navig- "able, and those not navigable*, it intended to provide "*that the common law rules of riparian ownership* "should apply to lands bordering *on the latter;* but "that the title to lands bordering on *navigable* streams, "should stop at the stream, and that all such streams "should be deemed to be and remain public highways."

In the case of Hardin v. Jordin, 140 U. S. 402, the court held as follows: "It has been the practice of the "government, from its origin, in disposing of the pub- "lic lands, to measure the price to be paid for them, by "the *quantity of upland granted; no charge being made* "*for the lands under the bed of a stream or other body of*

"*water.* The meander lines running along, or near "the margin of such waters are run for the purpose of "ascertaining the exact quantity of the upland to be "charged for, *and not for the purpose of limiting the "title of the grantee to such meander lines.*"

In Barney v. Keokuk, 94 U.S. 324, and Packard v. Bird, 107 U.S. 661, and Hardin v. Jordan, 140 U.S. 402, it was held: that the beds of streams, above the flow of the tide, whether actually navigable or not, *belonged to the proprietors of the adjoining lands.*

St. Louis v. Ritz, 138 U.S. 226.

In the case of Hardin v. Jordin, 140 U. S. 402, the court uses the following language: "The disposal of "the present case, therefore, seems to us to require no "further discussion—only an answer to the single "question, what is the common law, in regard to the "title to fresh water lakes and ponds? And on this "subject we think there can be very little difference "of opinion. Of course, as already stated, there is no "question, where the land fronts upon a fresh water "stream or river. In such cases, the law is perfectly "plain. Sir Mathew Hale states: Fresh rivers of "what kind soever, do of common right *belong to the "owners of the soil adjacent;* so that the owners of the "one side, have of common right the property of the "soil, and consequently of the right of fishing usque "ad filium aquae, and the owners on the other side, "the right of the soil and fishing under the filium "aquae on their side."

So it is clear, that the complainant acquired title *to the center* of this inland lake. Certainly this is so, unless the patent to Burnell, through which the Cleveland Iron Mining Company claims title by its description, *east half of 10 and west half of 11*," carried title to the south line of 10, projected through the lake.

No executive of the government, charged with the duty of selling the public lands, and issuing the patents, could *vary* the uniform rule as to title to purchasers by any form of patent of abutting lands on inland lakes, ponds or rivers. as the United States courts have frequently held, that "the registers of local land "offices, are mere sales agents of the government. The "survey and division of the lands are entrusted to "the surveyors. Their action is conclusive, and the "registers are bound to sell by the plats furnished "them. They can sell in no other manner."

Kissell v. St. Louis Public Schools, 18 How. 19.
Bagnell v. Broderick, 13 Peters 450.
Barnard v. Ashley, 18 How. 43.
West v. Cochran, 17 How. 403.
Gazzam v. Lessee of Philips, 20 How. 372.

In Gazzam v. Lessee of Philips, 20 How. 372, the court held, that the surveyor general had power to make fractional subdivisions, of fractional sections of public land, containing more than eighty acres. In fact that he had discretion as to the form of division of public lands, and the description of those divisions; the court in that case overruling Brown v. Clements, 3 Howard 650. In fact it is the settled law of the United States courts, that the descriptions as made of the surveys, by the surveyor general are controlling; and when the patent is of the lands of a governmental description, according to government survey, and is of a fractional portion of land fronting upon an inland lake or water, according to government survey, these are the controlling words, and limit the amount of land to be paid for to the acreage of the fractional description as determined and entered by the surveyors in their minutes and upon their maps. So the patent to Burnell, which describes the land conveyed as the east half of 10 and the west half of 11, according to

government survey conveyed only the acreage as specifically stated by the surveyor general, as the acreage of each fractional lot within the limits of what would be the east half of section 10 and the west half of section 11, namely 555.15 acres, the specific acreage stated in the patent, and appearing by the government plats offered in evidence to be the acreage of the uplands, and according to government survey; and all title which Burnell obtained under his patent to a portion of the inland lake (which which would be to the center of the lake) was by virtue of the law of riparian ownership, to which we have referred above; and not by virtue of the wording of the patent itself; and no title was acquired by Burnell, or conveyed by him to the Cleveland Iron Mining Company beyond the center of that lake.

Section 464 of the United States Statutes at large provides that the field books of the surveyor general shall be returned by the surveyor general, who shall thereafter cause a description of the whole lands surveyed to be made out and transmitted to officers who may have to superintend the sales, which is to be recorded and be in the possession of the parties who make the sales, and presumptively for use in such sales.

In the case of Parker v. Kane, 22 How. page 11, the court held, "that a description as a lot necessarily re-"fers to the official surveys in the general land office, "to which the court looks for the final determination "of the matter;" and which the statutes of the United States provides shall be the means of finally determining both the descriptions and quantity of lands conveyed.

In the case of Willson v. Hoffman, 70 Mich. 527, the court held as follows: "In granting patents for lands,

"it is usual for the government to add immediately "after the statement of the number of acres which the "tract contains, if it be fractional, these words: 'ac- "cording to the official plat of the survey of said lands "returned to the general land office, by the surveyor "general'. Such language when used constitutes a "part of the description of the premises conveyed, and "limits the purchaser to the tract as marked upon the "plat of the surveyor general. This was so held in "Gazzam v. Lessee of Philips, 20 Howard 372, which "overruled Brown's Lessees v. Clements, 3 Howard "650. This was the language used in the patent to "Tingley."

Thus, the description in the patent to Burnell, that it was 555.15 acres, according to government survey, fixed as a limitation the description and amount of the lands conveyed, namely, the fractional lots abutting upon the inland lake in question, and any right acquired under said patent in the land under the lake was by virtue of riparian ownership, which was only to the center of the lake.

IV.

Was the Decision in the Lower Court Based upon Ground Independent of the Federal Question?

Counsel for the defendant The Cleveland Iron Mining Company, in their printed brief served upon us, make a statement of facts *without preparing a printed record* of the evidence, or any portion of it, to submit to this court, sustaining their assertions; and without

even references to the printed record in the court below. This we claim is ground for the dismissal of this motion, and that it should be dismissed; as a motion for the dismissal of the writ of error in a case involving the wide and important interests which this case involves, should not be considered upon mere statements of counsel, not supported by a proper record for examination by the court. And we ask that the motion be dismissed for that reason. It is not our purpose to go into the review of the extensive facts of the case, or any fact, without reference to a record. As we understand the only questions involved here, are:

First. Was there in the court below a federal issue and passed upon by the lower court?

Second. Was the decision of the lower court arrived at upon ground independent of the federal question?

We think we have pointed out fully that a federal question is at issue in the case. We will now consider whether the supreme court of Michigan decided the case adverse to complainant independent of conclusions arrived at in disposing of the federal question. We assert that all of its conclusions were based upon, and collateral to the federal question, and cannot be separated from it; the lower court having held, as we have pointed out, that "complainant owned no specific piece of land north of the section line (south line of sec. 10), even under its own theory which could be measured by metes and bounds". See 76 N.W. Rep. 403. It proceeded, having laid the foundation therefor, by saying that the "complainant *owned no specific piece of land north of the section line*", to hold, that the Michigan statutory prohibition against alienating mining property, without the vote of *three-fifths* of the stock did *not apply* to this case because the complainant had no title in fee; and to hold that a pumping contract dated

the 17th day of March, 1892, signed by the mining agents of the three mining corporations, without the consent or knowledge of the stockholders of the complainant company, *amounted to a conveyance* by complainant to the defendants of *thirty acres of very valuable mining land;* the title to which in fee, was clearly in the complainant, as pointed out by the decisions above referred to. The officers of the complainant who signed this contract were simply the agents having charge of the mining business of this company, with no powers granted them by the stockholders to convey title, simply the right to operate the mine and to do what was a part of its operation—the pumping of the water that should gather in its mine, and upon the surface, as well as other necessary duties in connection with the operation of the mine, and not the disposing of the fee itself.

The Michigan statutory provision prohibiting alienation without the authority of three-fifths of the capital stock of the company, is section 4052 of Howell's Annotated Statutes of Michigan, and is as follows:

"No alienation, division, sale or mortgage of any, or "any part of the mine, works, real estate or franchise "of any corporation mentioned in the first section of "this act, shall have any force or effect, or pass any "title thereto, or interest therein, unless expressly "authorized by the vote of *three-fifths in interest of the "entire stock of said company*, actually present or le-"gally represented at some meeting of stockholders "called and notified, in accordance with the provisions "of the preceding section of this act, except the sur-"face right to land for village lots, or land not re-"quired for mining purposes, from which the timber "has been removed. Provided rights of way and de-

"pot grounds for railroads, and rights of way for rail-
"ways, may be conveyed by the proper officers of such
"co porations, when authorized by a vote of the major-
"ity of the directors thereof at any meeting regularly
"held."

The next section of the statute, 4053, provides for the mode of proving such action by the stockholders, and for preserving evidence of such action, that it may appear as a part of the chain of title. The statute is as follows:

"Any person desiring to *perpetuate* evidence of the
"facts on which the legality of any alienation, divi-
"sion, sale or mortgage of any of the real estate, mine,
"works or franchises of any such corporation, depends,
"may procure,

"*First.* An affidavit of the person or persons who
"served the notices of the meeting at which the same
"was authorized, on the several stockholders, showing
"the time and manner of such service.

"*Second.* An affidavit of publication of the notice
"of such meeting, if such notice be published, to be
"made by the printer of the newspaper in which the
"same was published, or by some one in his employ
"having knowledge of the facts; and

"*Third.* A transcript of the record of proceedings
"of such meeting to be verified by the oath of the sec-
"retary or other officer of such corporation having cus
"tody of said record.

"*Fourth.* Said affidavit and verified transcript may
"be recorded in the office of the register of deeds of
"the proper county in the book of miscellaneous rec-
"ords, and when so recorded, the original affidavits
"and transcripts, the records thereof, or a certified
"copy thereof, shall be prima facie evidence of the
"facts therein contained."

This statute not only provides that there *shall be no alienation, division, sale or mortgage*, of any *or any part* of the mine works, real estate or franchise of any corporation mentioned in the first section of this act * * unless expressly authorized by the vote of three-fifths in interest of said company actually present or legally represented at some meeting of stockholders called and notified, as provided by the statute quoted above; but it also provides how proof shall be perpetuated, and how made; that three-fifths in interest of the entire stock of the company authorized the conveyance of its property and franchise; and the statute provides for the recording of such action by the stockholders upon the records of the county with as much formality as the recording of deeds of conveyance. There is no proof whatever of any such action; but it appears affirmatively that there were negotiations between Alfred Kidder, mining agent of the complainant, and Mr. Mills, mining agent of The Cleveland Iron Mining Company, and by him with the defendant The Lake Superior Iron Company, with regard to making the pumping contract. See page ~~149~~ of said record; the pumping contract appearing upon pages ~~150~~ and ~~157~~ of said record.

The defendants claim this pumping contract to be in effect a *conveyance* by the complainant of its title, to its portion of the bed of the lake north of the south line of section 10; and the supreme court of Michigan has sustained this contention of the defendants—*not* as it holds, by ignoring the statute to which we have referred; but by *first holding* as we have pointed out above; that the complainant *had acquired no title in fee to the land in dispute.* Holding, that "The com-"plainant *owned no specific piece of land north of the* "*section line*, even under its own theory which could

"be measured by metes and bounds. How much, if "any it owned, could only be determined by agree- "ment, or a decree of a court of equity." Now, we respectfully submit, that it is impossible to know what the supreme court of Michigan meant by this holding. We can only surmise that the learned judge who wrote the opinion had in mind that the right acquired by complainant to the territory under the waters of the lake appurtenant to its short frontage, was an *inchoate, indefinite right; which did not amount to a title in fee.* That it was a right that could not be measured, because it would have to be determined what it was, either by agreement or by the decree of a court of equity. The court certainly could not have meant that a title in fee of land consisting of about *thirty acres*, could not be determined by metes and bounds; either on general rules of law established, or by equitable rules, where disputes existed between the parties as to this particular case; even though it was necessary to go to a court of equity to determine the dispute between the parties as to the apportionment of their rights. It did not make the title, which they were seeking to have equitably located, any less real estate or any less determinable by law governing real estate, on account of such dispute. So we say if in the determining of the federal question, the Michigan supreme court intend to say that the complainant had no real estate, no vested title in realty in the disputed territory under the waters of the lake, and therefore its mining agent and superintendent could, under the name of pumping contract, convey away any rights which it had, under the theory of settling boundary lines, or any other theory; then not only was the court in error as to the federal question, but was basing its conclusion as to the validity of the contract made by

the three mining agents of the companies, upon the erroneous determination of the federal question; and such determination was therefore collateral to and dependent upon the erroneous determination of the federal question referred to.

Counsel for the defendants, to sustain their contention, quote from the opinion of Chief Justice Fuller in the case of Hammond v. Johnson, 146 U. S. 78, for the purpose of pointing out the rule of this court as to cases determined by lower courts upon grounds independent of the federal question involved. The clause in that opinion quoted by counsel we are entirely in accord with, and it is our contention, and is as follows:

"It is well settled, that where the supreme court of "a state decides a federal question in rendering a "judgment, and also decides against the plaintiff in "error upon an independent ground *not involving a "federal question*, and broad enough to maintain the "judgment, the writ of error will be dismissed without "considering the federal question."

It will thus be seen that the ruling is, that if the holding claimed to be an independent one, *involves the prior determination of the federal question, and it rests upon the prior determination of that question, and is ancillary to, and subservient to the determination of the federal question*, and is not broad enough, and distinct enough to stand alone, without such determination in the determination of all of the rights of the parties in a clear, comprehensive and just way; then it is not such an independent ground as will deprive this court of jurisdiction. Such is the case at bar. Our contention is,

First. That this pumping contract was not a conveyance of the real estate rights of complainant in any way. That there was no such intention on the part of

even the mining agents and mining superintendents who had to do with the making of the contract.

Second. That even if they had so intended, that the contract is absolutely void as a conveyance, as it was without the sanction and authorization by three-fifths in interest of the entire stock of the corporation, and that nothing can give vitality to such a contract, to convey the realty of the mining corporation; and the only basis upon which the court below holds the contract valid is to hold "complainant *was not alien-* "*ating, dividing or selling any of its real estate within* "*the language of the statute. Alienating means in law* "*a transfer of title by conveyance.*" 76 N. W. Rep. 403. It is difficult to understand what the learned judge delivering the opinion meant by that statement; when it is claimed that the territory lying between the center of the lake, and the south line of section 10, opposite lots 2, 3, 4 and 5 of section 15, amounting as shown by the figures in the proof, to about *thirty acres*, is claimed to be effectually disposed of, whatever those rights may be, by the pumping contract. What can that pumping contract be but a conveyance of the title of the thirty acres, by whatever name it may be called, if it conveys title to said land? But, says the learned judge in the opinion, on the same page from which we have quoted, "It may be said that the stat- "ute does not apply to the voluntary adjustment of "these lines, but to alienation by deed of conveyance." It is a misnomer to say that under the circumstances this was simply the *adjustment* of *lines.* It was the determination of who owned *thirty acres* of territory *surrounded by independent lines*, which the bill asked the court to definitely and equitably locate. The learned judge speaks of this matter as though it were merely the adjustment of border lines, as a line be-

tween two lots of a city, as to just where that line should be between adjoining owners. That is not the case. The fundamental inquiry is, whether or not the complainant or defendants owned the territory abutting lots 2, 3, 4 and 5 of section 15, under the waters of Lake Angeline, and to its center, amounting to thirty acres; or, whether the defendant owned it. The determining where the lines should be located, to equitably surround the thirty acres, if owned by the complainant, would be simply an incidental determination of the court, or the determination of the *method* to be adopted by the parties in locating those lines. It will be noticed that the statute against alienation, also prohibits "dividing", etc., real estate, etc.

It will be noticed that the learned judge in the court below, both in stating the claims of complainant and of defendants, sets forth the conflicting claims of ownership of the land in question under the lake (see 76 N.W. Rep. p. 400), and then points out the claim of defendants of title to the disputed territory because of the making of the pumping contract, which was a division of the territory under the lake; this pumping contract carrying out that *division*, which we say is simply an attempt to alienate or convey a title without right, if there had been any intention of the agent of the complainant company to do such a thing, which they deny. After stating the facts the first determination made by Justice Grant in the lower court was as follows: "No fixed rule ever has been, "or ever can be laid down for the division of the terri- "tory covered by these inland lakes with irregular "shores. Each case must depend upon its own pecul "iar circumstances and facts, and as reasonable a "division arrived at as possible"

See 76 N. W. Rep. page 401.

This is undoubtedly correct, and was the occasion of our filing the bill; and the learned judge does not speak of it there as simply settling a boundary, but as a "*division*" of the territory covered by the inland lakes, which it was; a conveyance or an attempted conveyance, if the agent of the complainant had either intended to do so, or had had any authority to do so.

The next holding of Justice Grant, on the same page of the opinion, is as follows: "The *first* obstacle for "the complainant to remove, before resorting to an "equitable apportionment is this contract (pumping con- "tract), recognized as valid and acted upon for nearly "five years by all parties." It was recognized as a contract for pumping, draining the mine, etc.

The next holding of Justice Grant in the case is on the next page of the opinion, and is as follows: "We "find that the parties in reliance upon that case, en- "tered into a *deliberate contract* (pumping contract) es- "tablishing their boundary lines, and determining the "amount of territory belonging to each, complainant "made the contract with the knowledge that it gained "territory south of the line, known to be valuable, "while it surrendered territory north of the line, not "then known to possess any value."

Thus, the court asserts and holds the validity of the contract without giving any reason at that point for it: Subsequently holding, as we have pointed out, because the statute of Michigan against alienation *did not apply.*

Again, on the same page of the opinion, Justice Grant holds as follows, as to the pumping contract: "The *agreements* and settlements of parties made with "full knowledge of the facts, and in reliance upon the "law, ought to be as binding as the judgment of a court "in a particular case.* * * * * *Judgments rendered,

"and contracts made, upon the faith of the law, as "enunciated in the decision of the court, in the "absence of fraud or misrepresentation, must stand."

And again, "This case, therefore is to be decided "according to existing state of things, when the *settle-"ment in question took place*" (referring to pumping contract), and on the next page of the opinion, the learned judge again says: "The sole basis of complainant's "claim is, that the decision of this court, upon the faith "of which the *contract* was made, was subsequently "overruled."

Again holding, on the same page, "Does the *contract* "*settle the boundary line* and acquiescence therein, and "the *acts done thereunder estop* complainant, to now "assert a different line? The rule is settled by the de-"cisions of this court, that where disputed boundary "lines have been established *by express agreement*, or "under such circumstances, that an agreement will be "implied, and parties have for any considerable time "recognized them, they will be upheld, though title by "adverse possession could not be maintained."

And again, on the same page of the opinion the court held, "If his testimony be true (referring to Kidder, "the mining agent), and for this purpose the company "must stand by its own testimony, there was a dispute, "and it was settled *by the agreement*."

Again, the court held, "Complainant, however, in-"vokes the doctrine that title to land cannot rest on "estoppel, on account of the statute of frauds, and that "a vote of three-fifths of the entire stock of the com-"pany is essential under the statute to convey title. "The obvious reply to the first proposition is that it is "also established that the statute of frauds, *does not* "*apply to boundary* lines, and that the doctrine of estop-

"pel will be applied to the voluntary adjustment of dis-
"puted boundaries."

Again holding, "Under the theory of complainant,
"corporations could not settle boundary lines without
"a meeting of the stockholders called to pass upon the
"alienation of its lands, etc."

And then in the opinion we come to the quotation referred to above, in discussing the federal question. "The Cleveland Iron Mining Company claimed title "by virtue of the original patent. The complainant "*owned no specific piece of land north of the section line*, "*even* under its own theory, which could be measured "by metes and bounds, how much, if any, it owned "could only be determined by agreement, or the decree "of a court of equity."

Further, "There was no alienation of land, as re-
"quired the vote of the stockholders."

Further, "All are now estopped to deny its due ex-
ecution and validity." Referring to the above refer-
ence to the "pumping contract."

Further, on the next page, "The *foundation of the* "*contract* was the settlement of the boundary lines, "and the *division of the territory* and apportionment "of expenses in accordance therewith."

The above quotations cover the substance of the entire opinion, the determination of the court. Incidental *dicta* is used in the discussion of the case, but the holding and determination is *based* upon two grounds:

First. That the complainant *had no title in fee.*

Second. That having *no title in fee*, the contract of the 17th of March, 1892, known as the pumping contract, *divided, apportioned* and *conveyed* every right which it did have (the court not determining what that was), and that the statute against alienation of

corporate real estate *had no application;* which holding *could not have been made except upon the theory that the determination of the federal question above referred to was correct.* Incidentally the court held, that the complainant was estopped by its *contract* (the pumping contract) from asserting any title under the lake. Thus, basing the suggestion of estoppel upon the contract itself, as a valid one.

We submit that the entire determination on all the material questions in this case were subservient to and based upon the erroneous determination of the federal question, and that jurisdiction should not be ousted; but that the entire record should be reviewed by this court.

It will be noticed that Justice Grant does not for a moment intimate in his opinion that the real estate of a mining corporation can be disposed of by conveyance, without a three-fifths vote of the stock in interest. In fact, by inference affirms former holdings of that court that it cannot, only says the statute does not apply.

Justice Thomas M. Cooley, of Michigan, delivering the opinion of that court, referring to this act, for the purpose of protecting stockholders against any acts or omissions of the corporate agent, says, "This act was "passed to protect the interest of stockholders in min-"ing companies. It intends that their mining prop-"erty *shall not be conveyed away or mortgaged, except "by their deliberate action after they have been notified "of a proposal to do so, and have had time to deliberate "upon and fully consider it.*"

Beecher v. M. & Rolling Mill Co., 45 Mich. 103, 107.
Lockwood v. Thunder Bay Co., 42 Mich. 539.
Hartford v. Cambria, 80 Mich. 495.

And Judge Campbell, one of Michigan's former supreme judges, referring to this statute requiring the recording of the action of the stockholders, referred to above, held that: "Provision was made for obtaining "and recording evidence of such action. * * * * "*The deed is not made presumptive evidence of the right-* "*ful character of the sale.*"

M. H. & O. R'y Co. v. Atkinson, 44 Mich. 167, 168.

It must affirmatively appear that the statute has been complied with. There can be no estoppel where there is no legal power to do the act, in reference to which it is claimed the estoppel exists, i. e. *parting with this land.* The officers, directors and agents could not by direct conveyance transfer title. Neither can they by acts or omissions."

O. & M. Co. v. O. Co., 130 U. S. 1, 37.
Pa. R. R. Co. v. St. L. R. 118 U. S. 290, 317.

The supreme court of Michigan, in its opinion in this case could not have intended to hold, as an independent determination, that a title by estoppel was created, independent of the pumping contract referred to, because it has many times been held in Michigan, by that court, that "*title to land cannot pass by a mere* "*estoppel, shown by parol;* neither can an apparent "title be assailed by the parol evidence of one who "has caused its transfer."

First National Bank of Kalamazoo v. McAllister, 46 Mich. 398-406.

And Justice Cooley, in Hayes v. Livingstone, 34 Mich. 384, held: "Title to lands *cannot pass by estop-* "*pel;* and if the plaintiff claims not the title, but the "right of permanent possession, this comes to the same "result. Citing Nims v. Sherman, 34 Mich. 45." And in the case of Insurance Co. v. Dix, decided Sept. 14th,

1897, by the Michigan supreme court, and 72 N. W. Rep. 179-180, it was held by Justice Hooker, that "It "was well settled in Michigan, that *titles in land can-* "*not rest on estoppel in pais.*"

So, it is clear that when Justice Grant uses the language: "The complainant was estopped by its own contract from asserting any title under the lake", he referred only to an estoppel *built upon the contract*, and upon the theory that the contract was a *valid and legal one*, and whether valid and legal, as we have pointed out, *rests upon the federal question.* So that there is no determination in this case by the supreme court of Michigan, that *does not rest* upon the erroneous determination of the federal question.

V.

A Few Facts.

Though it is not our purpose, in considering this motion, to go into the review of the facts, except so far as it is necessary in discussing the question of jurisdiction, that is to any extent—, still, on account of the discussion in defendant's brief, in support of their motion, we will call attention to a few prominent facts bearing upon the question of title.

As we have already pointed out, since 1852 and 1853, complainant, or its grantors, have been the owners of lots 2, 3, 4 and 5 of section 15, lying south of the lake, and therefore owners of the riparian rights under the lake to its center. It appears that, since the early sixties, the complainant has been operating an iron

mine on these forties, and has all of the time openly asserted ownership north of the south line of section ten, and has been in actual occupation of that territory; filling in with waste from its mine, north of the south line of section ten, and has made three or four acres of ground above the water level in the lake, and has erected buildings thereon, such as machine shop, blacksmith shops, etc , worth several thousand dollars. (See pages ~~144, 145, 146~~ of said Record). This is admitted in part on page two of defendant's brief. Mr. Kidder, the local mining agent of the corporation; the company having its headquarters and chief business managements in Pittsburgh and Cleveland, refused to consider a proposition made by Mr. Morse, the local mining agent of the Cleveland Iron Mining Company, for complainant to quit claim its interest north of the south line of section ten to the Cleveland Iron Mining Company, provided the Cleveland Iron Mining Company would quit claim all of its territory south of that line. This is admitted in defendant's brief, page 3. Thus, the ownership of the complainant north of the south line of ten, was asserted by it and was, to a certain extent, recognized by the Cleveland Iron Mining Company, or by Mr. Morse its local agent, by negotiating the purchase, or rather exchange of territory, as admitted.

It further appears that Mr. Kidder, the local agent, openly and in every other way, by occupation, asserted this ownership and right of this territory, until he learned of the decision of the Michigan supreme court, in Clute v. Fisher, 65 Mich. page 48, where the court, contrary to its former decisions, held, that the owner of a fractional lot on an inland lake, "had the right to *square out that lot*, by extending the line into the lake, so as to take in the territory submerged by the lake

within said extended lines", which would deprive the complainant of its title to the center of the lake, if enforced by the squaring out of the fractional forties on the north side of the lake, as shown by the little map of the lake attached; and though he believed that decision to be wrong and unjust, and that it would be subsequently overruled; under the advise of his counsel, as a precautionary measure, moved his buildings, consisting of machine shop, etc., off of the ground which he had filled in the lake, north of the south line of section ten, just over the line to the south, and made no resistance to the rights asserted by the defendants to the territory north of the south line of section ten, until the Michigan supreme court *overruled* Clute v. Fisher, 65 Mich. 48, in Ice & Coal Company v. Ice & Coal Company, 102 Mich. 227, there holding, as held by this court in Gazaam v. Lessees of Phillips, 20 How. 372, that the abutting owner on an inland lake, *is the owner to the center of that lake*, and also holding, that the decision of Clute v. Fisher, 65 Mich. 48, was erroneous.

Mr. Kidder testified that he first learned of this overruling of Clute v. Fisher in February, 1896 (see pp. 147, 148 of said Record), though the decision of Ice & Coal Company v. Ice & Coal Company was made September 27th, 1894. (See p. 172 of said Record). That he immediately notified the company of the overruling of Clute v. Fisher, and that the company directed him later, to maintain their rights there. He further stated, that, in the meantime, the complainant, in exploring for iron ore south of the south line of section ten and near the line, discovered iron ore, and drove their drift on the bottom of their mining shaft, to the south line of section ten (see pp. 165-167 of Record); that this was before the overruling

of Clute v. Fisher. That he informed Mr. Mills, who was the mining captain for the Cleveland Iron Mining Company, of the discovery of this ore; *that this discovery was made by them, in May or June, 1891* (see p. ~~197~~ of said Record). That he got information by his work, that the ore would probably go under the lake north of the south line of ten. in 1892 (see p. ~~167~~ of said Record). That, in the spring of 1895, the Cleveland Iron Mining Company began mining under the lake in this disputed territory. That after he was directed by his company to do so, on October 29th, 1896, he served notice on the defendant the Cleveland Iron Mining Company, that they were upon the territory of the complainant (see p. ~~168~~ of said record). The defendant, The Cleveland Iron Mining Company, kept right on mining in this disputed territory to the time of hearing in the circuit court for the county of Marquette, in 1897, and ever since; and by the evidence which was uncontradicted upon the hearing, it appears that the total expenditures of the defendant, The Cleveland Iron Mining Company, in the driving of its drifts, and its total equipment in the disputed territory of machinery, etc., a large portion of which was portable and and easily moved, amounted to the cost of between fifty and fifty-one thousand dollars, and that the *profit* which it had realized from the mining of the iron ore, on this disputed territory, amounted to over $156,000, leaving the balance over $100,000, of profit, over and above every expense of every name and nature that it had incurred, thus show that there was no equity, in defendant claiming that it had made large expenses and would suffer loss by this arroneous holding of Clute v. Fisher, and its overruling in Ice and Coal Co. v. Ice and Coal Co., and the asserting title by complainant of its property, which it

had never conveyed, and had, in no way, intentionally disposed of, and had not disposed of, unless the contract, known as the "pumping contract" had that effect? As we have said, the pumping contract was made upon the 7th of March, 1892 (see page 150 of said Record).

This pumping contract was made after the decision of Clute v. Fisher, and before it was overruled by Ice and Coal Co. v. Ice and Coal Co., 102 Mich., and there was, in the minds of neither party to that pumping contract, any idea or intention, that the pumping contract should be a conveyance of real estate. There was no occasion for such an idea in the minds of either party, for, as we have said, the Michigan supreme court had erroneously interpreted the rights of the parties, at that time, in Clute v. Fisher, contrary to prior holdings, and it was supposed by Mr. Kidder that his company had been deprived of its legal rights by such decision, and the defendants supposed that they had the title affirmed to them, by that decision, which they had previously tried to negotiate to purchase, through Mr. Kidder, but could not; and there was neither an intention to purchase, nor an intention to sell, any real estate rights, at the time of making that paper, as appears by all the testimony, the contract was made simply to arrange for pumping the water out of the lake. In considering the question of jurisdiction, these facts probably have no bearing, except to point out that the claim of equities asserted in counsel's brief for defendant are without substantial foundation, and that it is a cold, naked question of fact whether or not the complainant obtained title to the territory in question, from the government, through its grantees; or whether the defendant acquired such title, and whether the complainant, if it acquired such

title, has ever legally disposed of it to the defendants or either of them. These were the questions presented to the state court. As we have pointed out above, the the state court held, *that the complainant acquired no title, in fee,* to the territory in question. That the defendants did, holding the federal question in favor of defendants, and further holding, that the pumping contract *was a practical conveyance of title,* and of right that the complainant had; and that *because* the complainant *had no title in fee,* no real estate right, possessed *only some inchoate right, just what the court does not say.* The Michigan statutes *forbidding alienation* of real estate of mining corporations, *without the vote of three-fifths* in interest of all the stock, this does not apply, because no real estates interest attached to complainant. These are the questions, except possibly, the further question, whether the court held the doctrine of estoppel, on account of the pumping contract; that is estoppel by contract. If it did, this question would be but ancillary and *supplemental to the federal question,* as would the question of the contract itself, and could not, in any sense, be an independent determination that would warrant or support the decree against complainant, independent of the federal question involved, as it is as dependent on the federal question as is the question of title by contract; which we have fully discussed above.

We submit, that the jurisdiction of this court is fully sustained and the defendants have pointed out no valid reason why the jurisdiction should not be exercised, and the case reviewed upon its merits, by this court.

VI.

The Court Should Inspect the Record to be able to Determine the Federal Question.

This was so held in a recent case, Green Bay & M. Canal Company v. Patent Paper Company, 19 Supreme Court Reporter, 100, in the language of Justice Shiras, on a motion to dismiss the writ, in the following language: "The contention, that no federal question "is disclosed in the record is sufficiently disposed of, "we think, by an inspection of the cross complaint "filed by the Green Bay & Mississippi Canal Company. "It was there *claimed* that the water power in question, "was created by a dam, canal and other improvements "owned and operated by the United States, and that "the right *and title* of the said Canal Company, to the "use of the water power so created, arose under and by "virtue of certain *alleged* and recited acts of congress, "and acts of the legislature of the state of Wisconsin, "relating to the improvement of Fox River as a public "highway, and especially *by virtue of an alleged con-"tract between the United States and the Canal Company*, "whereby the use of the surplus water created by said "dam and canal was granted and reserved to the Canal "Company. Assuming the truth of such allegations, "it is *plain* that the plaintiff in error *asserted a right*, "*title and authority*, exercised under the United "States. * * * * This contention is based on the words "in Section 709 of the Revised Statutes, carried for-"ward from the twenty-fifth section of the Judiciary "act of 1789, 'specially *set up or claimed*', and the "effect to be given to these words has been frequently "considered by this court. * * * * * The last elabor-

"ate discussion of this phase of the subject, is found in "the opinion of the court in Oxley Stave Co. v. But- "ler Co., 166 U. S. 648, 17 Supreme Court Rep. 709, de- "livered by Mr. Justice Harlan, in which many of the "cases are reviewed, and from which the preceding "quotation is taken; but *no particular form of words or "phrases has ever been declared necessary in which the "claim of Federal rights must be asserted.* It is suf- "ficient if it appears from the record, that such rights "were specifically *set up or claimed*, in the state court "in such manner, as to bring it to the attention of that "court. The true and rational rule this court said in "Bridge Proprietors v. Hoboken Co., 1 Wall. 143, is, "that the court must be able to see clearly, from the "whole record, that a certain provision of the constitu- "tion, or act of congress was relied on, by the party "who brings the writ of error, and that the *right thus "claimed by him was denied.*

"In Roby v. Colehour, 146 U. S. 159, 13 Supreme "Court Rep, 50, it was said, that our jurisdiction being "invoked, upon the ground that a right or immunity "specially *set up or claimed*, under the constitution or "authority of the United States has been denied by "the judgment sought to be reviewed, it must appear "from the *record* of the case, either that the right *so "set up or claimed*, was expressly *denied, or that such "was the necessary effect in law, of the judgment.* If it "appear from the record by the clear and necessary in- "tendment that the federal question *must have been di- "rectly involved*, so that the state court *could not* have "given judgment, *without deciding it that will be suf- "ficient.*

"Powell v. Supervisors, 150 U. S. 410.
"Saward v. Denny, 158 U. S. 180,
"Chicago & B. Q. R. Co. v. City of Chicago,
"166 U. S, 226.

"As then in its *cross complaint*, the Canal Company "explicitly *set up* and *claimed*, as the *foundation of these "alleged rights*, the acts of Congress, and the *transac- "tions, between the United Sates and the Canal Com- "pany*, under which the United States became the "owner of the dam, canal and other improvements on "the Fox River, and the Canal Company became vest- "ted with its rights in the surplus water power inciden- "tal to said works, and as in the final judgment, the "supreme court of Wisconsin *necessarily held adverse- "ly to these claims of federal right*, we hold that the "motion to dismiss, for want of jurisdiction, must be "overruled, and that *it is our duty to inspect the record, "in order to see whether there was error in the rulings of "the court below.*"

In the case of Dewev v. City of Des Moines, 19 Supreme Court Rep. 381, this court in the language of Justice Peckham, holds: "Nor does the record herein "show, by clear and necessary intendment, that the "federal question must have been directly involved, so "that the state court, could not have given judgment "*without deciding it. In such case, it has been held that "the federal question sufficiently appears.* Green Bay "& M. Canal Co. v. Patent Paper Co., 172 U. S. 28; 19 "Supreme Court Rep. 97", and cases cited.

"In substance, the validity of the statute, or the "right under the constitution, must have been drawn "in question. Powell v. Brunswick, 150 U. S. 433. Saward v. Denny, 158 U. S. 180.

"The latest decision to this effect is Capitol Nation- "al Bank v. First National Bank of Cadiz, 172 U. S. "425, Supreme Court Rep. 202."

As we have pointed out, the complainant relies upon its *title* by patent from the government, to the fee in question. The defendants rely upon their patents from

the government in conflict, with the title of complainant; and the state court has passed upon upon the title thus drawn in question by conflicting patents. The situation appears both by pleadings, and by proof, and by the decision of the state supreme court. This question of title from the United States is the fundamental element of the case, drawn in question by clear and necessary intendment. Therefore, as suggested by Justice Shiras in the opinion just cited, for a proper determination of the subject matter of so important a case as the one at bar; on a motion to dismiss, "it is "the *duty of the court to inspect the record*, in order to "see whether there was error in the rulings of the "court below", as well *as to determine whether a federal question is involved*, and whether that federal question is at the basis of all controlling determinations in the case.

VII.

Defendants' Claims.

On page 7 of defendants' brief, we find the following admission:

"It is true the defendant The Cleveland Iron Min-"ing Company *claimed* in one defense *of its answer*, "that the United States patent, under which it derived "title, gave it *all the land north of the south line of sec-"tion 10*, and that this fact *was denied* by The Lake "Angeline Company. The case, however, was not de-"cided, nor made to depend in any manner upon the "construction of such patents, but upon various other "defenses made in the answer."

Counsel on pages 7 and 8 state as follows:

"By examination of this opinion it will be seen that "no importance whatever was attached to the con- "struction of the patents under which the several par- "ties claimed title; but on the contrary, the bill in "chancery was dismissed, and the complainant denied "all relief on the following grounds, which, while not "stated in that order, were nevertheless distinctly de- "cided by the supreme court:

"*First.* That the exact boundary line between the "parties was in controversy, and that the parties set- "tled such controversy and fixed the boundary among "themselves, to-wit, the pumping contract; and the "proceedings which led up to it. In other words, "there was a boundary settlement."

As we have in the discussion above carefully pointed out, the determination of the court was that the defendants were the *owners* under their patent rights to about *thirty acres* of land in dispute between complainant and defendants, and that the complainant *owned no portion* of the territory north of the south line of section 10. This determination was in no sense the simple settlement of boundary, but was the determination of ownership of a large and very valuable mining territory. It was the determination that the pumping contract was valid, though not complying with the statute of Michigan as to alienation of mining property, *because the complainant had acquired no title in fee;* the determination of the federal question. There is no force in this position of defendants' counsel.

Second, It is further claimed by council, on the 8th page of their brief, that the determination of the court was, "that the complainant in error here, by "virtue of its long acquiescence in such *boundary*, and

"in view of the large expenditures made, and to be "made, especially by reason of the *existence of the "pumping contract*, which imposed long and continu- "ous burdens upon the defendant, was *estopped* from "questioning the title and ownership of the Cleveland "Iron Mining Company *in all property north of the "section line.*"

As we have pointed out above, this position has no force, because as we have shown, any suggestion of *estoppel*, in the opinion of the state court, is *based* upon the erroneous holding as to the pumping contract; and so specifically held by Justice Grant; and could not be under the laws of Michigan, as title to real estate cannot be predicated upon an estoppel in parol, as shown by the authorities which we have cited above.

Counsel also state that complainant offered this pumping contract in evidence. That is true, and that too with proof of the agent, Kidder, and of the mining superintendent, Walters, that it was a contract simply for pumping out the lake, and in no way intended or supposed to refer to partitioning of real estate rights. The contract points out what each one is to do, the defendants to operate the pumps after the lake was drained; and the complainant to construct a flume and operate it at its own expense, the whole length of the lake on the south side of the lake, not only to carrying off the water flowing from its own abutting territory, but to take the water from the inlet to the east of the lake, and carry it along and upon the territory of complainant, so as to prevent it flowing into the old bed of the lake; and also to take the water that was pumped by the defendants from the bed of the lake itself. Thus, apportioning what each should do for the common benefit, in keeping the old bed of the lake free from water.

We attach below a copy of this pumping contract.

Third. On page 8 of defendants' brief, counsel also claim, "That the parties on the faith of the pumping "contract had materially changed their condition and "situation, and that it was impossible to restore the "parties to the statu quo existing before the making of "that contract."

Under the laws of Michigan, title to real estate cannot be obtained by *adverse possession short of fifteen years of actual* adverse holding. As we have pointed out above, the statute against alienation of the mining property, forbids alienation by its officers unauthorized by three-fifths of the stock. Justice Grant in delivering the opinion of the state court, by inference affirmed that fact by saying that the complainant *having no title*, the statute *did not apply.* We have pointed out conclusively that under the law of the United States the complainant did have a title, and our whole claim is based upon that predication; and the Michigan supreme court has held, in the language of Justice Campbell, as quoted above, referring to the statute against alienation of mining property, as follows:

"Provision was made for obtaining *and recording* "*evidence of such action.* * * * The *deed is not pre-* "*sumptive evidence of the rightful character of the sale.*" Thus, it is conclusively held by the Michigan supreme court, that it *must conclusively appear* that the statute has been complied with as to alienation of mining property; that it was authorized by a three-fifths vote of all the stock of the company, and that the *production of a deed* executed by the officers of the company *is not presumptive evidence of the rightful character of the sale.* So that the pumping contract, if it had been a deed itself (which we say it is absurd to call it), or even a contract to sell, it would be ineffectual, unsup-

ported by the statutory proof of authority by the stockholders, to show a conveyance or a transfer of any right.

Counsel say in their brief in the paragraph quoted from, "that the court held that it was impossible to "restore the parties to the statu quo existing before "the making of that contract." Such a state, if made, was mere dicta. The holding itself, as seen from the opinion, was that there was an *estoppel by contract*, and the words claimed to be quoted, if made, would be simply the stating of a condition, and has no force as a determination in the case. Besides, from the uncontradicted evidence which we have pointed out above, in the two years that the defendant Cleveland Iron Mining Company carried on the mine upon this disputed territory, which had been found by the complainant itself under the lake, the defendant realized over $100,000 clear profit, over all expenditures of every kind and character, and it has been more than compensated during its two years operation, for all expenditures. It simply drove drifts from its mine north of the lake under the lake to the territory of complainant, and has taken out the ore, without the installing of any new plants of machinery; nothing but the driving of drifts and the bracing up of stopes as it took out the valuable deposit, and lessened the value of the fee, to the injury of the complainant. On the matter of accounting, all equities defendant may have in the matter could be easily adjusted.

We submit that counsel have not in any way pointed out error in our position, that the determination of the federal question is the *underlying ground* of the entire opinion of the Michigan supreme court.

F. O. CLARK,
Solicitor for Complainant.
ALFRED RUSSELL, *of Counsel.*

PUMPING CONTRACT.

THIS AGREEMENT, Made this 17th day of March, A. D. 1892, by and between The Cleveland Iron Mining Company, first party, and The Lake Superior Iron Company, second party and The Pittsburgh & Lake Angeline Iron Company, third party, all corporations organized under the laws of the State of Michigan.

WITNESSETH.

First: That, whereas, the three parties to this agreement severally own all the land surrounding Lake Angeline, in the County of Marquette, State of Michigan, and, iron ore having been discovered under the bed of said lake, it has become necessary to pump out the water of said lake and permanently thereafter drain the bed thereof in order that each of the parties hereto may economically mine such ore as lies under such portions of said bed as each of said parties is respectively entitled to.

Second. And whereas one B. C. Howell, prior to the date of this contract, had a large pump, suitable for such work and proposed to said first party to contract to pump out said lake and to sell said pump and necessary appliances, all for the sum of thirty-three thousand dollars ($33,000.00), provided he could begin operations immediately, while firm ice remained in said lake, so as to furnish the necessary support for placing the proper timber work in position; and, whereas, said first party, after communicating with said second and third parties and getting their approval, has

entered into a contract with the said Howell to pump out the water of said lake and to purchase said pumping apparatus and appliances for said sum, thus making a large saving in the cost thereof; and, whereas the cost of the continuous drainage of the bed of said lake, after the water thereof is pumped out, is now impossible of ascertainment, and the parties hereto are desirous of fixing the proper proportion of expense, both of the purchase of said pumping apparatus and of the said pumping out of said lake and of the cost of the continuous or permanent drainage of the bed thereafter, to be borne by each, the same being for the mutual benefit of all.

Now, therefore, The parties hereto, in consideration of the premises and of mutual considerations received by each from each, the receipt of which is hereby respectively acknowledged, hereby agrees as follows:

Said First Party Agrees;

First: To bear and pay eight-fifteenths (8-15) of the entire cost of the purchase of said pump and apparatus and of the pumping out of said lake, under the arrangement with the said Howell, to wit, the sum of seventeen thousand six hundred dollars ($17,600.00), and eight fifteenths (8-15) of any additional cost which may be necessarily incurred in the premises, and will also bear and pay one-fifth (1-5) of the value of said pump and appliances after the lake is pumped out, which one-fifth (1-5) thereof is to be deducted, as hereinafter provided, from the amount to be paid by said third party.

Second: After said lake is once pumped out by said Howell, to maintain and operate the said pumping apparatus and plant for the continuous and permanent

drainage of the bed of said lake, advancing all necessary expenses for such maintainment, operation and repairs, and, at the end of each calendar year, to pay and bear such a proportion of the cost thereof during the year preceeding, as the total number of tons of ore mined and produced by said first party from that portion of said lake-bed belonging to it, during said year, bears to the total number of tons of iron produced and mined during such year by said first and second parties jointly from the bed of said lake, and further, to bear and pay two-thirds (⅔) of the cost of any additional or other apparatus which may be needed for the permanent drainage of said lake.

Said Second Party Agrees—*First:* To bear and pay four-fifteenths (4-15) of the entire cost of the purchase of said pump and apparatus and of the pumping out of said lake under the arrangement with the said Howell, to-wit: the sum of eight thousand, eight hundred dollars ($8,800.00), and four-fifteenths (4-15) of any additional cost which may be necessarily incurred in the premises.

Second: To bear and pay to said first party, on settlements to be made at the end of each calendar year, such a proportion of the entire cost of maintaining, operating and repairing the plant for the permanent drainage of said lake-bed, as the total number of tons of iron ore produced and mined by said second party, from that portion of the lake-bed owned by it, during such year, bears to the total number of tons of iron ore produced and mined by said first party and said second party from the entire lake-bed during such year, and also to bear and pay one-third (⅓) of the cost of any additional or other apparatus which may be needed for the permanent drainage of said lake.

Said Third Party Agrees—*First:* To bear and pay

three-fifteenths (3-15) of the entire cost of the account to be paid to the said Howell under the arrangement of said first party with him, to-wit., three-fifteenths (3-15) of the said thirty-three thousand dollars ($33,000.00), namely, the sum of six thousand six hundred dollars ($6.000,00), and three-fifteenths (3-15) of any additional cost which may be necessarily incurred in the premises, less one-fifth (1-5) of the value of said pump and appliances purchased from the said Howell under the arrangement with him, the value of which is to be estimated as soon as the first drainage of said lake is completed.

Second: To erect and maintain a proper and sufficient flume, so constructed above the present water level of Lake Angeline as to divert and carry away all the surface water or other surface drainage which would otherwise come into the present bed of said lake from all the land lying above the present water level of said lake, and south of the south line of Section Ten (10), as projected through said lake, and also to run into said flume any and all water which the said third party may pump from its mine or mines; which said flume said third party agrees to maintain and keep in repair and in successful operation, diverting such drainage from the bed of said lake until the iron ore to which said third party is entitled, lying in, or under that portion of the bed of said lake lying south of said south line of said section is mined and exhausted, and then, to turn over said flume in good repair to the said first and second parties hereto without charge, and to allow them, thereafter, to operate and maintain the same for the purpose of continuing said drainage, giving the employees of said first and second parties free access in and to said flume for the purpose of maintaining, repairing and operating the same, allowing them to

make such alterations in said flume and in the direction of the same as may be necessary to successfully accomplish such drainage.

It is mutually agreed, by and between the parties hereto:

First: That each of the parties hereto will respectively pay, on demand, their proper proportion of the amounts due from each, as aforesaid, under the arrangement with the said Howell, when and as called for by W. G. Mather, of Cleveland, Ohio, who is hereby appointed the trustee of all the parties to this agreement, to collect the amount due from each, and to pay the same to said Howell in accordance with the terms of his contract.

Second: That, in case of any dispute arising between the parties hereto, either under this contract or in regard to their joint operations in or about the drainage of the bed of the said lake, all such matters of dispute shall be settled by five (5) arbitrators one to be chosen by each of the parties hereto, and the other two (2) to be selected by the arbitrators so chosen, an award in writing of any three (3) of said arbitrators to be binding and final upon the parties hereto. In case of a dispute, however, between two (2) only of the parties to this agreement, but three (3) arbitrators shall be chosen, one (1) by each of said disputing parties, and the other by two (2) so chosen, and the award in writing of any two (2) so chosen shall be binding and final upon the parties between whom such dispute has arisen.

Any party to this agreement desiring such arbitration shall have the right to the appointment of arbitrators in manner above provided, by serving a ten (10) days written notice of its intention to so arbitrate on the other party or parties to this agreement, who shall

each respectively within the time limited in said notice, select its arbitrator, and, in the event of its failure so to do, then the party desiring said arbitration shall have the right to select an arbitrator in lieu of the one or ones failed to be appointed by the other party or parties, and an award in writing of a majority of the arbitrators so chosen shall be final and binding upon the parties to such arbitration.

Third: This agreement shall extend to and be binding upon the successors, assigns and grantees of the respective parties hereto, precisely as if said respective successors, assigns and grantees had been specially designated herein.

It is mutually agreed, by and between the first and second parties hereto, as follows:

First. That the said first party, through its proper agent or employees, shall keep an accurate and exact account of the cost of operating and maintaining said pumping plant and appliances for the permanent drainage of the bed of said lake, which accounts shall, at all reasonable times, be open to the inspection of the said second party through its agents or employees, and that, before any improve or other machinery or appliances are purchased for the purpose of the permanent drainage of said lake, the said second party shall be consulted concerning the purchase thereof, and its approval obtained; and on or before the tenth day of January of each calendar year, a written statement of the cost of maintaining and operating said drainage plant and appliances for the preceding year shall be sent to said second party by the said first party, together with a full, complete and accurate statement of the total number of tons of iron ore mined during the preceding year from the bed of Lake Angeline by said first party, and, on or before the said tenth day of Jan-

uary of each such year, the said second party shall send to the said first party a full, complete and accurate statement of the number of tons of iron ore mined or produced by said second party from the bed of Lake Angeline during the year preceding.

And the said second party agrees, within ten (10) days from the receipt by it of said account, to pay to the said first party its proper proportion of the cost of maintaining and operating said pumping and drainage plant, as above provided, and also, on demand, one-third ($\frac{1}{3}$) of the cost of such other and additional appliances and apparatus as may have been previously agreed on by the first and second parties hereto, as above provided. *Provided*, however, that if, when said accounts for the permanent drainage during any year are rendered to said second party, said second party is willing, for the succeeding year, to undertake the permanent drainage of said Lake Angeline at a less cost than that incurred by the said first party for the year last preceding, the said second party shall thereupon have the right, during the succeeding year, to take possession of said permanent pumping and drainage plant, together with all appliances, and operate and maintain the same itself, permanently draining the said lake bed during such year, advancing all the cost thereof, in which event the said second party shall keep and render the accounts above required to be kept by the said first party, and the said first party, within the time above limited, after the expiration of any such year, shall pay to the said second party its proportion of the cost of such permanent drainage, in the manner and within the time above provided, and if, at the end of any such year, the said first party is willing to undertake the permanent drainage of said lake for the next succeeding year at a cost less than

that incurred by the said second party, it shall have the right to do so, as above provided, it being understood that either, at the end of any year, shall have the right to operate said permanent drainage plant for the next succeeding year, provided it is willing to guarantee to do so at a less cost than that incurred by the other party during the year next preceding.

If desired by either said first or said second party, the respective statements of the amount of ore respectively mined and produced by each in each year from the respective portions of the bed of Lake Angeline owned by each shall be under oath and sworn to by the agent or employee of each party having knowledge of the facts.

In Witness Whereof the parties hereto have caused these presents to be duly executed in triplicate by their respective officers and their respective corporate seals to be attached as of the day and year first above written.

THE CLEVELAND IRON MINING COMPANY,
By WILLIAM G. MATHER, *President.*
[CORPORATE SEAL].
Attest: FRED A. MORSE, *Secretary.*

Signed, sealed and delivered
in presence of
L. G. MADISON,
FRANK B. WHITE.

THE LAKE SUPERIOR IRON COMPANY,
By G. W. R. MATTESON, *President.*
[CORPORATE SEAL].
Attest: A. C. TENNY, *Secretary.*

W. B. BOSSON,
CHAS. HALL ADAMS.

THE PITTSBURGH & LAKE ANGELINE IRON COMPANY,

By JAS. LAUGHLIN, JR., *President.*

[CORPORATE SEAL].

Attest: W. G. POLLOCK, *Secretary.*

W. C. QUINN,
WILLIAM F. ROBB,
A. C. DUSTIN,
C. A. JUDSON.

STATE OF OHIO, *Cuyahoga County,* } ss.

Before me, Alton C. Dustin, a commissioner of deeds for the state of Michigan, residing in the city of Cleveland, county of Cuyahoga and state of Ohio, personally appeared William G. Mather, president, and Fred A. Morse, secretary of The Cleveland Iron Mining Company, to me personally known and known to be such officers respectively, who then and there acknowledged that they duly executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and that the same is the free act and deed of themselves as such officers.

In Witness Whereof, I have hereunto set my hand and official seal, this 17th day of March, A.D. 1892.

[SEAL] ALTON C. DUSTIN,

Commissioner of Deeds for Michigan residing in Cleveland, Ohio.

STATE OF MASSACHUSETTS, }
County of Suffolk, } ss.

Before me, Chas. Hall Adams, a commissioner of deeds for the state of Michigan, residing in the City of Boston, County of Suffolk and state of Massachusetts, personally appeared G. W. R. Matteson, president and A. C. Tenney, secretary of The Lake Superior Iron Company, to me personally known and known to be such officers respectively, who then and there acknowledged that they executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and that the same is the free act and deed of said corporation, and the free act and deed of themselves as such officers.

In Witness Whereof, I have hereunto set my hand and official seal, this sixth day of July, A.D. 1892.

[SEAL] CHAS. HALL ADAMS,
Commissioner of Deeds for Michigan residing in Boston, Mass.

STATE OF PENNSYLVANIA, }
Allegheny County, } ss.

Before me, William F. Robb, a commissioner of deeds for the state of Michigan, residing in the city of Pittsburgh, County of Allegheny and state of Pennsylvania, personally appeared James Laughlin, Jr., president of The Pittsburgh & Lake Angeline Iron Company, to me personally known and known to be such president, who then and there acknowledged that he executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and

that the same is the free act and deed of himself as such president.

In Witness Whereof I have hereunto set my hand and official seal this twentieth day of August, A.D. 1892.

[SEAL] WILLIAM F. ROBB,
Commissioner of Deeds for Michigan,
residing in Pittsburgh, Pa.

STATE OF OHIO, }
Cuyahoga County. } ss.

Before me, Alton C. Dustin, a commissioner of deeds for the state of Michigan, residing in the city of Cleveland, county of Cuyahoga and state of Ohio, personally appeared William G. Pollock, secretary of the Pittsburgh & Lake Angeline Iron Company, to me personally known and known to be such secretary, who then and there acknowledged that he executed the foregoing instrument for and on behalf of said corporation, duly authorized thereto, and that the same is the free act and deed of himself as such secretary.

In Witness Whereof I have hereunto set my hand and official seal this 22nd day of August, A. D. 1892.

ALTON C. DUSTIN,
[SEAL.] *Commissioner of Deeds for Michigan,*
residing in Cleveland, Ohio.

SUPREME COURT OF THE UNITED STATES.

The Pittsburg and Lake Angeline Iron Company, *Plaintiff in Error,* *v.* The Cleveland Iron Mining Company, and The Lake Superior Iron Company, *Defendants in Error.*	*Case No. 17,363.* *Term No. 260.*

Writ of Error to the Supreme Court of the State of Michigan.

Brief for Complainant and Appellant on Motion to Dismiss the Writ of Error, and on Hearing.

STATEMENT OF FACTS.

The complainant and the defendants are mining corporations organized under the laws of Michigan, and are operating mines in Marquette County, Michigan, Lake Superior Iron District. They have acquired title to all of the fractional subdivisions of lands surrounding Lake Angeline, a small inland lake, covering an area of 148.61 acres, and which is entirely in sections 10, 11 and 15, Township 47, N. Range 27 W., as shown on a map between pages 34 and 35 of the record, where also appears the United States government field notes, showing the courses and distances of the meandered

line of said lake, as certified by the Commissioner of the United States General Land Office.

The complainant is owner of government *fractional* subdivisions, lots 2, 3, 4 and 5 of said section 15, all lying south of the lake. Complainant acquired title to these lots over thirty years ago, and has been in possession and mining on them ever since. This title was acquired through parties who purchased and obtained patents from the United States government. (See pp. 30 to 33 of Rec.)

The defendant, The Lake Superior Iron Co., is the owner of *fractional* government lots 4 and 5, in said section 10, fronting on the lake to the north and west, and is also the owner of the mineral right under government lot 6, in said section 10, which lies to the south of the lake, and north of the section line between said sections 10 and 15. The *surface* of said lot 6 is owned by the complainant, conveyed to it by the defendant, the Lake Superior Iron Company. Lot 6 is very small, containing only .35 of an acre, aside from the territory under the lake, appurtenant thereto, as a riparian right.

The Cleveland Iron Mining Co. owns lots 2, 3 and 7, in the southeast quarter of section 10, and lot 1 in the southwest quarter of section 11. These subdivisions constitute the entire surroundings of the lake (see map p. 35 Rec.). This is admitted by the answers of both defendants (see p. 24 Rec.). These several ownerships, as above stated, are alleged in the bill of complaint (see pp. 1 to 16 of Rec.), and are admitted in both answers (see p. 24 Rec.).

Paragraphs 5, 6 and 7 of the bill of complaint alleges that complainant acquired title to government lots 2, 3, 4 and 5, of said section 15, by mesne conveyances from William Petit, John Burt and others, who were

patentees from the government. The patent to William Petit was dated in 1852. Patent to John Burt was dated the 3rd of September, 1853. These facts are not contradicted. (See pp. 5 to 12 and 30 to 33 of Rec.)

The Lake Superior Iron Co. acquired title by conveyance from Isaiah Briggs, patentee. His patent was dated May 2, 1851. (See p. 33 of Rec.)

The Cleveland Iron Mining Co. acquired title by conveyance from Lorenzo D. Burnell, patentee from the government, dated July 2, 1850. (See p. 33 of Rec.)

These conveyances transferred to complainant lots 2, 3, 4 and 5, of said section 15, and to defendant, The Lake Superior Iron Company, lots 4, 5 and 6, and the northwest quarter of the southwest quarter of said section 10; and to the defendant, The Cleveland Iron Mining Co., lots 2, 3 and 7 of the southeast quarter of section 10, and lot one of the southwest quarter of the southwest quarter of section 11; and the balance of the up land in the east half of section 10 and the west half of section 11, all in Township 47, N. Range 27 W. These several ownerships, as above stated, so far as the *up land* is concerned, are not in dispute in this case.

II.

FEDERAL QUESTIONS INVOLVED.

The *fundamental* controversy in this case arises from conflicting claims as to riparian ownership of the land under said lake, acquired under the several patents from the U. S. government. The bill of complaint was filed in the state court in one of the circuits of the upper peninsula of Michigan, known as the Lake Su-

perior District. Relief prayed for was denied at the circuit, and complainant appealed to the supreme court of the State; and relief was also denied there, and the case is here for review upon writ of error. We claim that it is properly here by writ of error to the supreme court of Michigan, under the provisions of section 709 of the Revised Statutes of the United States, which provides that, "*Where any title, right privilege or immunity, is claimed under the Constitution, or any Treaty or Statute of, or Commission held, or authority exercised under the United States, and the decision is against the title right, privilege or immunity, specially set up or claimed by either party under such treaty, Statute, commission or authority, may be re-examined, and reversed or affirmed in the Supreme Court upon writ of error,*" etc. The right of review, by writ of error from this court, to the supreme court of the State, was held by this court to exist under the provisions of this United States Statute, in the case of Shiveiy v. Bowlby, 152 U. S. 10—a case removed from the supreme court of the State of Oregon to this court. That case and the one at bar are very similar.

The defendants deny that there is any federal question involved. Complainant insists that there is not only a federal question involved, but that all other determinations by the Michigan supreme court rest upon it. The complainant in the fifth paragraph of its bill alleges that it acquired title to the land described as "fractional lot" 5, Sec. 15, Township 47, N. Range 27 W., through a patent from the United States government to John Burt, dated Sept. 3, 1853, and mesne conveyances to it. That it also acquired title to land described as "fractional" lots 3 and 4, in said section 15, through a patent issued to William Petit by the United States government, and mesne conveyances to it. That

it also acquired title to lot 2 in similar manner from the United States government, and mesne conveyances to it. That these lots were surveyed by the United States government as "fractional" and had a frontage on said Lake Angeline; and that it acquired title *under* the waters of this small inland lake to its center, as riparian owner, in proportion to its shore frontage. (See paragraphs 5, 6 and 7 of bill.)

One of the defendants, the Cleveland Iron Mining Company, in its answer alleges, that by virtue of a United States patent to Burnell, and mesne conveyances to it, it became the owner of a large portion of the said territory under the lake claimed by complainant as riparian owner; and the Cleveland Iron Mining Company alleges, in paragraph 4 of its answer (p. 23 of Record), that, "It was the intention of the government "to convey to the said Lorenzo D. Burnell (through "whose patent it claims), the entire east half of section "10, and the entire west half of section 11, described "in the bill, to the full extent and limit of the section "line of said section, *as bounded on the west by the north "and south center line of section 10, and on the east by "the north and south center line of section 11; and on "the south by the south section line of sections 10 and 11, "regardless of the meander line of said Lake Angeline.* "That it was the intention of both the government and "the grantee under and by virtue of the *terms of said "patent*, that the patentee should have the *full limit "of said two half sections as aforesaid;*" to the extent of 640 acres, the same as though Lake Angeline were not there.

It appears that the complainant alleges ownership to *about thirty acres* of land under the waters of said lake and to its centre, opposite its shore frontage, lying north of the south line of section 10 (if extended

through the lake); and alleges that it now holds the title to the same as riparian owner under the patents from the United States government; and that said title by virtue of said riparian ownership extends to the center of the lake, as it was when the patents were executed. (See portions of paragraph 7 of the bill of complaint, pages 10 and 11 of the Record. Also see map Exhibit A attached to bill of complaint, between pages 14 and 15 of the Record. Also complainant's Exhibit F of the evidence, between pages 40 and 41 of the Record).

And also evidence of mining engineer, E. F. Bradt, commencing with page 36, extending to and including page 42 of the Record.

From this evidence and said maps and by the allegations of the bill, and the other proof, it appears that the complainant alleges and claims ownership to the center of this inland lake, as riparian owner of that portion of the land under the lake lying between government meander corners 13 and 16 of the lake on the south side; said meander corners being at the intersection of section line between said sections 10 and 15, with the said meander lines of the government, as they cross the said south line of section 10. The disputed territory is surrounded on map Exhibit "F", page 42 of the Record, by said south line of section 10 between said meander corner 13 and 16, and dotted line from said meander corner 13, to a point marked "center" of said lake; said dotted line being by course and distance south 66 degrees and 16 minutes west 32.28 chains; and also by dotted line from said meander corner 16 to said "center" by course and distance north 51 degrees and 49 minutes west 20.75 chains, less the *mineral* right under lot 6 lying between meander corners 14 and 15 on the said south line of section 10; which last named

meander corners are also connected with said "center" by dotted lines; the one from meander corner 14 being north 26 degrees and 53 minutes east 14.58 chains; and the other south 2 degrees and 37 minutes west 12.84 chains (see Exhibit "F", page 42 of the Record). The complainant, as stated above, owned the surface of this lot 6 and to the center of the lake by deed from the Lake Superior Iron Company, conveying lot 6 of said section 10 to the complainant. The acreage of the territory thus surrounded, and as appears on Exhibit "F", page 42 of the Record, is figured in four separate subdivisions, one part lying to the west of the north and south center line from quarter post on the south line of section 10, extending through and across the lake to the north, amounting to 14.92 acres. Second—the territory opposite lot 6 to the center of the lake between the dotted lines just referred to amounting to 4.05 acres. Third—the acreage between the dotted line from meander corner 15 to the center of the lake to the point marked "center" on the map Exhibit A, amounting to 10.84 acres. The total acreage formerly covered by this inland water is testified to by the engineer Bradt, as well as the total frontage along the lake; and the relative proportion of ownership in this lake, according to the relative frontage, appears at the right hand corner of complainant's Exhibit F, between pages 40 and 41 of the Record.

The witness Bradt testified to measurements and mathematical computations of the same, and from these computations we find that when we add together the territory under the lake south of the dotted lines mentioned, running from said meander corners 13 and 16 to the "*center*" of the lake, and north of the south section line of 10 we have an amount equal to 38.73 acres, 5.10 less than the amount of relative acreage be-

longing to complainant in proportion to the shore frontage, as shown by the figures in the northeast corner of the map, made by engineer Bradt.

What complainant claims is, that it is the owner of the territory under the waters of the lake by virtue of its riparian right to such portion of the lake to its center, as will be in proportion to its shore frontage; and that each of the defendants are entitled to a similar portion of ownership, adjacent to their shore frontage and ownership.

The defendant the Cleveland Iron Mining Company, in its answer denied complainant's ownership of the territory north of the south line of section 10, projected east and west through the waters of said lake, and asserted its ownership to all of the land under the waters of the lake claimed by the complainant, and north of said south line of section 10, if projected east and west through the lake, and lying east of the north and south center line of section 10 from the quarter post; the Cleveland Iron Mining Company claimed to own this territory under the *patent* to Burnell, and mesne conveyances to it; and asserted such claim in its answer, as appears upon pages 23 and 24 of the Record; and which we have quoted above.

Thus, by pleadings, there is alleged a conflict of title between complainant and defendant the Cleveland Iron Mining Company, arising under *conflicting patents from the United States;* the complainant asserting ownership by virtue of riparian rights appurtenant to its shore frontage to the center of the lake, as acquired by its patents (see pp. 30 to 33 of the Record). The Cleveland Iron Mining Company asserting title by virtue of a *specific* description in the patent to Burnell conveying "the east half of section 10 and the west half of section 11, in Township 47 N. Range 27 W., etc., (see p. 33 of the Record)

Under such description, the defendant The Cleveland Iron Mining in its pleadings asserted and claimed that such description conveyed to its grantor not only the *upland* and the "fractional" lots abutting on the waters of the lake; *but also all of the territory which would lie north of the south line of section 10 if projected as above stated, and within the limits of the east half of section 10 and the west half of section 11; if the south* line of section 10 was projected east and west through the waters of the lake (see pp. 23 and 24 of Record); and it further claimed that the provision in the Burnell patent that it was the east half of 10 and the west half of 11 was controlling; and by metes and bounds gave it the full 640 acres which would be contained in the east half of section 10 and the west half of section 11, had there been no inland lake within the limits of that territory.

Thus, title to about thirty acres of mining territory adjacent to complainant's mine, under the lake and extending from its center to the south line of section 10 if projected east and west through the lake, is in dispute in this cause, complainant and defendant *each claiming it through patents from the United States government.*

As we have shown, the pleadings assert *conflicting ownership* acquired from the government through United States patents; and this presents the *fundamental federal questions* involved in this case, viz: did the complainant acquire title to the center of the lake by virtue of its ownership of said government lots 2, 3, 4 and 5; or, did defendants obtain title by virtue of their several patents, to a point where the south line of section 10, if projected east and west through the water of the lake, would run?

It appears that the patentees through whom the

complainant acquired title, received their patents describing the lands purchased, either as lots 2, 3, 4 and 5 of section 15, or described as "fractional" portions of section 15; in fact the patents referred to the lots in describing them as "fractional" lots, containing a certain acreage (see pp. 30 to 33 of the Record). The patent to Burnell, through whom The Cleveland Iron Mining Company claims, contains the following description: "The east half of section 10 and the west "half of section 11, in township 47 N. of range 27 W., "*containing five hundred and fifty-five acres and fifteen "hundredths of an acre*, according to the official plat of "the United States government" (see p. 33 of Record).

Under the pleadings and proofs, with this federal question thus presented, the supreme court of Michigan specifically passed upon this federal question in various ways, and in one place in the following language:

"*The Cleveland Iron Mining Co. claimed title by "virtue of the original patent. Complainant owned no "no specific piece of land north of the section line*, even "under its own theory; *which could be measured by "metes and bounds.* How much, if any, it owned could "only be determined by agreement, or the decree of a "court of equity."

As will be noticed, this is a direct determination of the *federal question* involved, as to title acquired under conflicting United States patents; and not only presents a federal question, but a *fundamental one*, upon which the other determinations of the court in this case rest; as will be seen by further review of that opinion. With all respect for that distinguished court we say, its holding is erroneous; because the abutting owners, either acquired title to the center of the lake, by virtue of the riparian rights appurtenant to their abutting

ownerships under the laws of the United States, or they did not. If they did acquire such real estate title, the *limits* of the ownership, could be fixed by metes and bounds, or *disputed methods* of locating those metes and bounds could be *settled* by the judgment or decree of a court where all disputes as to ownership must be settled, if not amicably adjusted without litigation; and the fundamental error of the supreme court of Michigan is as we allege, that it held that "The Cleveland Iron Mining Co. *claimed title by virtue "of the original patent. Complainant owned no specific "piece of land north of the section line,*" etc. Thus holding title in the Cleveland Iron Mining Co., and *no title* in the complainant as to the disputed territory. *This is the real issue in this case. All other conclusions of the court rest upon it.*

Counsel for the defendant, The Cleveland Iron Mining Co., in their brief, on the motion to dismiss the writ of error in this case served upon us at the time of this writing presents no argument and cites no authorities to show that these facts do not present a federal question. They confine themselves to the simple statement that "we do not think any federal question exists in the case. That this federal question is the *fundamental* controversy, as shown by the pleadings and the proofs, there can be no doubt; and where such issues exist in the supreme court of a state, and are passed upon as the *fundamental* determination of the *entire* controversy, the right of removal to the supreme court of the United States exists under the provisions of section 709 of the Revised Statutes of the United States, which statute we have quoted above.

Referring again to Shively v. Bowlby, 152 U. S. 10, we quote from the language of Mr. Justice Gray, delivering the opinion of the court as follows: "This

"case concerns the title to certain lands below high "water mark in the Columbia river in the state of "Oregon. The defendant below, now plaintiff in error, "claimed under United States, and the plaintiff below, "now defendant in error, claimed under the state of "Oregon. The judgment against its validity proceeded "upon the ground that the grant from the United "States upon which it was founded passed no title or "right as against the subsequent deed from the state "in the lands below high water mark. *This is a direct "adjudication against the validity or a right or privilege "claimed under the laws of the United States, and pre-"sents a federal question within the appellate jurisdic-"tion of this court.* Revised Statutes, section 709. "That jurisdiction has been repeatedly exercised with-"out objection or doubt in similar cases on writs of " of error to the state court.

St. Paul & P. R. Co. v. Schurmeir, 71 U. S. (7 Wall.) 272.
Packard v. Bird, 173 U. S. 661.
Knight v. U. S. Land Association, 142 U. S. 161.

"In this case the supreme court of Oregon held, that "the complainant had no title by virtue of riparian "rights."

The supreme court of Michigan, as we have pointed out under similar conditions held the same thing in this case, that complainant "*owned no specific piece of land north of the section line.* See 76 N.W. Rep., page 403. Also the same opinion by Chief Justice Grant, page 262 of Record.

The case of Shively v. Bowlby, 152 U. S. 10, is directly in point, and the language of Mr. Justice Gray in that case applies with equal force to the case at bar. Our claim in the bill of complaint is that the complainant *acquired title to the land under the lake to its center* by

virtue of its abutting ownership under the patents, and we not only allege this in the bill, but we point it out on map Exhibit "A", attached to the bill of complaint, which appears between pages 14 and 15 of the Record, and on said map Exhibit "A", we specifically point out how, by convergent lines to a common "*center*", under our theory of partition, an equitable designation of border lines of division can be established, so as to give a relative proportion of the lake to each owner of the shore frontage, in proportion to their shore ownership. Whether we are right as to that mode of equitable apportionment, and whether those lines have been equitably located on our map Exhibit "A", is of course for the court to determine and locate them where it will be equitable.

We have pointed out the lines enclosing the ownership of complainant in the lake; they enclose a territory of five acres and ten hundredths of an acre *less* than the relative proportion of the lake frontage would allow complainant to the total area of the lake.

The defendant, The Lake Superior Iron Co., in paragraph 6 of its answer alleges, "This defendant admits, "that the abutting owners upon said Lake Angeline "are the owners of the land and mineral under said "lake; but *denies* that all the said owners, and particularly *that the said complainant is the owner of the "land under the waters of said lake to the center of said "lake;*" and in paragraph seven of the same answer, the same defendant alleges, "This defendant *denies*, "that said complainant *is entitled to any such portion "of the bed of said Lake Angeline, as is claimed by it "in* said paragraph 7 of its bill, or that it is entitled to "or the *owner of any portion of the bed of said lake "situated in said section 10*, except such riparian rights "as it is entitled to by reason of its purchase of said lot

"numbered 6 from this defendant, as hereinbefore "stated, excluding all mineral mining rights therein."

Thus, the defendant, The Lake Superior Iron Co., by its answer *denies the title of complainant*, as does the defendant, The Cleveland Iron Mining Company, and as we have pointed out above, the supreme court of Michigan held, complainant "*owned no specific piece* "*of land north of the section line, even under its own* "*theory, which could be measured by metes and bounds.*"

In speaking of the section line, referring to the south line of section 10, if projected east and west, through the lake; the court further held: "How much, if any, "it owned could *only* be determined by agreement, or "the decree of a court of equity."

Thus was presented a conflict of title under the patents of the United States goverment as to both the defendants.

This action was brought in equity for the *partition* of the territory under the lake among the abutting owners, according to their ownerships by the equitable method marked out in Lincoln v. Davis, 53 Mich. 390, in the language of Justice Campbell, which is as follows: "I agree that it depends on the law of the "state, how far rights may be exercised consistently "with public easements of navigation in the submerged lands; but I regard it *as settled by the common law* "*of this state that such rights exist, so far as they can* "*be reasonably enforced and identified.* * * * In "carrying out lines of ownership in narrow streams it "is easy to find the general course of a stream and to "draw lines perpendicular to that course from the terminal shore lines; but on lakes all lines from the shore "line *tend to converge in some central part of the lake;* "and while irregularity of shape prevents drawing "them to a common center, they must, if protracted,

"cross each other in a perplexing way. The rule "adopted in such waters where the whole surface "could be apportioned has *always been to divide the "water area in proportion to the shore frontage;* and "*never* to attempt any division by lines run from the "shore from such parts of the lake as are substantially "adjacent to the shore. In some cases by a fair parti- "tion a shore owner would by his extent of shore line "obtain a share beyond the center; but it seems *im- "possible* if the whole water is to be regarded as divid- "ed up, to reach a division without *some proceeding in "the nature of a partition, which would fix the various "possessions.*"

Thus establishing the rule of *apportionment by convergent lines* to a common "*center*" from the extremity of adjacent ownership, as we have described: The proposed division of the lake is as appears on map Exhibit "A" attached to said bill, and as also appears on map Exhibit "F" of the evidence (see p. 40 of Record). This mode of division apportions the lake into segments, practically in proportion to the length of the adjacent frontage owned by each. There can be no question that such division would be absolutely accurate if the lake was exactly round; but as suggested by Justice Campbell, the shore is usually irregular in form. Therefore, a division can only be arrived at in a manner most reasonable by an equitable apportionment under the direction of the court.

In the case of Jones v. Lee, 77 Mich. 40, Justice Campbell, delivering the opinion of the court, used the following language: "If this body of water were "not navigable, and if all its waters could in any way "be apportioned among the riparian proprietors for "any lawful purpose, it is evident that it could not be "done by reference to any *filium aquæ*, or middle

"thread; but must be done by the same rule of propor-
"tion which probably could only be got up by some
"*partition proceeding*, in as much as such waters are
"common for all ordinary purposes."

This quotation from 77 Mich. is cited with approval in Ice and Coal Co. v. Ice and Coal Co., 102 Mich. 237.

In the case of Hardin v. Jordan, 140 U. S. 402, this court used the following language: "If there should "arise any dispute between the plaintiff and other ri-
"parian owners of land, situated on the margin of the
"lake, as to the *convergence of the side lines* of the
"plaintiff's land in the lake; it can be disposed of by
"the parties themselves, or *by resort to equity*, or to
"such other form of proceeding as may be proper."

Thus, by this court, as well as the supreme court of Michigan, it has been held that it would not be proper to divide the territory of an inland lake similar to the one in question by undertaking to divide it filium aquæ, or at the middle or thread of the stream, as is done in dividing the territory under the waters of a river; but that it should be *by convergent lines to a common center, equitably determined by the court;* and that this be done as closely as can be under the circumstances, though it can never be accurate; but whatever may be the rule adopted for *partitioning* such inland lakes, we think there can be no question that the *actual title* to the submerged territory under the lake *belongs to the abutting owners* to the *center* of the lake or stream; the same to be apportioned in some equitable way between them, and that such title is vested in the purchaser of the lots abutting upon said inland water.

In the case of Murdock v. Myer et al, 87 U. S. (20 Wall.) 590, and succeeding pages, it was held that, "It "has been many times decided by this court on motion,

"*to dismiss this class of cases for want of jurisdiction;* "*that if it appears from the record, that the complainant* "*in error, raised and presented to the court by pleadings,* "prayer for instruction, or other appropriate method, "*one* of the questions specified in the statute (Sec. 709), "and the court *ruled against him, the jurisgiction of* "*this court attached;* and we must hear the case on its "merits."

Rector v. Ashley, 6 Wall. 142.
Bridge Proprietor v. Hoboken Co., 1 Wall. 116.
Fireman v. Nichol, 8 Wall. 44.
Armstrong v. Treasurer, 16 Peters 281.
Crowell v. Randall, 10 Peters 368.

It is stated, from the language of section 709 of the Revised Statutes of the United States, that the right to a writ of error from the supreme court of the United States to the supreme court of the state exists, whenever a right or title is asserted or claimed, and set up by either party under the statutes or decisions of the United States, or under its authority.

"A federal question is presented, *when* there is in- "volved a *controversy as to riparian rights acquired* "*under the laws of the United States.* A case arises "under the laws of the United States when *its proper* "*decision depends on the construction of the United* "*States law.*"

Cohens v. Virginia, 6 Wheat. 264, 379.

"*What a land patent conveys, is clearly a question of* "*United States law;* and upon this the court is to pass, "and its decision may be reviewed under the 25th sec- "tion of the Judiciary Act. The principle has been "repeatedly recognized, that *when* the question *in any* "*court, state* or federal, *is whether the title to land which* "*had once been the property of the United States, has*

"*passed, that question, must be resolved by the laws of "the United States.*"

Wilcox v. Jackson, 13 Peters 577.
Page v. Peters, 70 Wis. 182.
Wisconsin R'y. Co. v. Wis. P. Land Co., 71 Wis. 99.

In the case of Saward v. Denny, 158 U. S. 180, 183, Chief Justice Fuller stated this jurisdictional question as follows:

"First. The certificate of the presiding judge of the state court as to the *existence* of grounds upon which our interposition might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below.

Powell v. Brunswick Co. Board of Supervisors, 150 U. S. 433, 439.

"Second. That the *title, right, privilege,* or immunity must be *specifically set up or claimed* at the proper time and in the proper way.

Miller v. Texas, 153 U. S. 535.
Morrison v. Watson, 154 U. S. 111.

"Third. That such claim cannot be recognized as properly made, when made for the *first time in a petition* for a re-hearing after judgment.

Loever v. Schroeder, 149 U. S. 580, 585.

"Fourth. That the petition for the writ of error, forms no part of the record, upon which the action is taken here.

Butler v. Gage, 138 U. S. 52.

"Fifth. Nor do the arguments of counsel, though the *opinion* of the state courts *are now made such by rule.*

Gibson v. Schouteau, 75 U. S. 314.
Parmalee v. Lawrence, 78 U. S. 36.
Ross v. U. S. M. Co., 108 U. S. 447, 484.
United States v. Taylor, 147 U. S. 665, 700.

"Sixth. The right on which the party relies, must have been called to the attention of the court in some proper way; and the *decision* of the court must have been *against the right claimed.*

Hoyt v. Thompson, 66 U. S. 518.
Maxwell v. Newbold, 59 U. S, 18 How. 515.

"Seventh. Or, at all events, it *must appear from the record*, by *clear and necessary intendment*, that the *federal question* was *directly involved*, so that the state court could *not* have given judgment *without deciding it*. That is, a definite issue, *as the possession of the right*, must be distinctly *deducible from the record* before the state court can be held to have *disposed of such federal question by its decision.*"

Powell v. Brunswick Co. Board of Supervisors, 150 U. S. 433, 439.

We insist, that tested by these principles, so clearly stated by the Chief Justice, that both by pleadings and proofs and by a clear determination of the supreme court of Michigan upon the issue thus raised, a federal question was not only presented by the pleadings in this case and passed upon by the supreme court of Michigan, but that this federal question thus presented and determined *was the basis of the entire opinion and conclusions arrived at;* that is, of *all* the conclusions of the supreme court of Michigan which *defeated the title of complainant* in that court.

As supporting the above opinion of Chief Justice Fuller, see

Baldwin v. Kansas, 128 U. S. 52, 56.
Kaukauna W. P. Co. v. Green Bay M. C. Co., 142 U. S. 254.
C. & N. W. Ry. Co. v. Chicago, 164 U. S. 454, 457.
Chicago & R. Co. v. Chicago, 166 U. S. 226, 230, 242.

Oakley Stave Co. v. Butler Co., 166 U. S. 648, 653, 654, 666.
Levy v. Superior, 167 U. S. 175, 177.

"A judgment which *rejects the claim*, but avoids all *reference to it, is as much against the party's right within the meaniug of* section 709 as if it had been specifically referred to and the right directly refused."

Chapman v. Goodman, 123 U. S. 511, 548.
O'Neil v. Vermont, 144 U. S. 323, 358.

"And if the decision of the supreme court of a state is against the plaintiff in error, and *must necessarily have involved a federal question, duly claimed in the state court, the jurisdiction of this court exists to review the case.*"

III.

Was the Decision of the Lower Court Based upon Ground Independent of the Federal Question?

We have pointed out that a federal question is at issue in this case. We will now consider whether the supreme court of Michigan decided the case adversely to complainant upon grounds independent of the federal question. We assert that all of its conclusions, *were based upon and collateral to the federal question, and cannot be separated from it;* the lower court having held, as we have pointed out, that "complainant *owned* "*no specific piece of land* north of the section line (south "line of section 10), even under its own theory, *which* "*could be measured by metes and bounds.*" See 76 N. W. Rep. 403. It based all its other determinations in the case upon that, as we will point out.

It was claimed by the defendants upon the hearing, that the president and secretary of the complainant company entered into a contract, dated the 17th of March, 1892, for *pumping* out Lake Angeline, and that this contract substantially amounted to a *conveyance* by complainant to defendants of all its rights to the territory under Lake Angeline, lying north of the said south line of section 10 projected through the lake. This pumping contract is upon page 88 of the Record.

The complainant denies any intention on the part of the president and secretary of the company to do more in that contract than to provide for the *pumping* out of the lake; and denies any authority on the part of its officers to make any other or further contract than simply for that purpose.

It appears from the testimony of Alfred Kidder, who was the local agent in charge of the mining operations of the complainant at the mines in Michigan, that the *entire negotiations* for the making of this contract were between himself as mining agent of complainant, and Mr. Mills, mining agent of the Cleveland Iron Mining Company who acted for his company and for the defendant the Lake Superior Iron Company (see p. 88 of Record), and for that purpose only; and the complainant, upon the hearing of this case, as a defense insisted this pumping contract could not be construed as conveyance of land, because the statutes of Michigan *prohibited* alienation of the mining real estate of complainant, unless the directors of the company were *authorized* so to do by a *vote of three-fifths in interest* of the entire stock of the company actually present, or legally represented at some stockholders' meeting called for that purpose, as provided in section 4052 of Howell's Annotated Statutes of Michigan. Which statute is as follows:

"No alienation, division, sale or mortgage of any, or "any part of the *mine, works, real estate* or franchise "of any corporation mentioned in the first section of "this act, shall have any force or effect, or pass any "title thereto, or interest therein, *unless expressly "authorized by the vote of three-fifths in interest of the "entire stock of said company, actually present or legally "represented at some meeting of stockholders called and "notified, in accordance with the provisions of the preced-"ing section of this act*, except the surface right to land "for village lots, or land not required for mining pur-"poses, from which the timber has been removed. Pro-"vided rights of way and depot grounds for railroads, "and rights of way for railways, may be conveyed by "the proper officers of such corporations, when author-"ized by a vote of the majority of the directors thereof "at any meeting regularly held."

The next section of the Michigan statute, 4053, provides for *the mode of proving such action by the stockholders*, and for preserving evidence of such action, that it may appear upon the records as a part of the chain of title. The statute is as follows:

"Any person desiring to perpetuate evidence of the "facts on which the legality of any alienation, division, "sale or mortgage of any of the real estate, mine, works, "or franchises of any such corporation depends, may "procure:

"First. An affidavit of the person or persons who "served the notices of the meeting at which the same "were authorized on the several stockholders, showing "the time and manner of such service.

"Second. An affidavit of the publication of the no-"tice of such meeting, if such notice be published, to "be made by the printer of the newspaper in which the "same was published, or by some one in his employ "having knowledge of the facts; and

"Third. A transcript of the record of proceedings of "such meeting, to be verified by the oath of the secre- "tary or other officer of such corporation having cus- "tody of said record.

"Fourth. Said affidavit and verified transcript may "be recorded in the office of the register of deeds of "the proper county in the book of miscellaneous rec- "ords, and when so recorded, the original affidavits "and transcripts, the records thereof, or a certified "copy thereof, shall be prima facie evidence of the "facts therein contained."

This statute not only provides that there shall be no alienation, division, sale or mortgage, of any or any part of the mine, works, real estate or franchise of any corporation mentioned in the first section of this act, unless expressly authorized by the vote of three-fifths in interest of said company actually present, or legally represented at some meeting of stockholders called and notified as provided by the statute as quoted above; but it also provides how proof shall be perpetuated, and how made; that three-fifths in interest of the entire stock of the company authorized the conveyance of its property and franchise, and the statute provides for the recording of such action by the stockholders upon the records of the county, with as much formality as the recording of deeds. There is no proof of any such action in this case, but it appears affirmatively that all negotiations were between Alfred Kidder, local mining agent of the complainant at the time, and Mr. Mills, mining agent of the Cleveland Iron Mining Company, and Mr. Mather, president of C. I. M. Co., and by them for the defendant, The Lake Superior Iron Company, with regard to the pumping contract. (See evidence of Mr. Kidder, p. 88 of Rec. Also evidence of Mr. Mills, pp. 193-194 of Rec.)

As we have said, the defendants claim this pumping contract to be in effect a *conveyance* by the complainant of its *title* to its portion of the bed of the lake, north of the south line of section 10. And the supreme court of Michigan by its decision has sustained title in the defendants—not by ignoring the statute against alienation of corporate property, to which we have referred, but by *first holding as we have pointed out above*, that *the complainant had acquired no title in fee to the land in dispute*, and that, "The complainant *owned no* "*specific piece of land north of the section line*, even "under its own theory, *which could be measured by metes* "*and bounds*. How much, if any, it owned could *only* "be determined by agreement, or a decree of a court "of equity."

Now, we submit, that it is difficult to understand what the supreme court of Michigan meant by this holding. We can only surmise that the learned judge who wrote the opinion had in mind, that the right acquired by complainant to the territory under the waters of the lake, appurtenant to its shore frontage, was an *inchoate, indefinite right, which did not amount to a title in fee*. That it was a right, if anything, that *could not be measured*, and it must be determined what it was, either "*by agreement, or by the decree of a court of equity.*" The supreme court of Michigan certainly could not have meant that a *title in fee* in land consisting of *about thirty acres*, could "*not be* determined *by metes and bounds*," either under general rules of law or by equitable rules, when disputes existed between the parties as in this case. Even though it was necessary to go into a court of equity to determine the dispute between the parties, we insist that it did not make the title, which the complainant sought to eqitably apportion, any less real estate, or any less deter-

minable by law governing corporate real estate on account of such dispute. So we say, if in determining the federal question, the Michigan supreme court held that the complainant *had no real estate*, no vested title in realty in the disputed territory under the waters of the lake, and therefore its mining agent and superintendent could, under the name of a pumping contract, convey away any rights which it had, under the *theory* of settling boundary lines, or any other theory; then not only was the court in error as to the federal question, but was *basing* its conclusion as to the validity of the contract made by the three mining agents of the companies, so far as conveying title, *upon the erroneous determination of the federal question;* and such determination as to the conveyance of any rights in the fee by said pumping contract was therefore *collateral to and dependent upon the prior erroneous determination of the federal question referred to, viz: That the complainant had no title in fee or real estate interest in the disputed territory.*

Thus, it is plain that the supreme court of Michigan, in holding that the Michigan statute against alienation of mining real estate did not apply, did so under the theory or conclusion previously stated, that the "*complainant owned no specific piece of land north "of the section line*", and that if it owned any right there, it was simply an inchoate, indefinite right, the nature of which is not explained by that court.

Now, it has been held by this court in the case of Hammond v. Johnson, 146 U. S. 78, as follows:

"It is well settled, that where the supreme court of "a state decides a federal question in rendering a "judgment, and also decides against the plaintiff in "error, upon an *independent* ground *not involving a "federal question; and broad enough to maintain the*

"*judgment*, the writ of error will be dismissed with-
"out considering the federal question." In this case every holding of the supreme court of Michigan is subsequent to and based upon the determination of the federal question in the case, which was that the complainant "owned no specific piece "of land north of the south line of section 10, even "under its own theory, which could be measured "*by metes and bounds.* How much, if any, it owned, "could *only* be determined by agreement or decree of "a court of equity."

Thus determining, it *rejected as inapplicable* the defense that the statute of Michigan against alienation applied because they say that statute applied only to real estate rights. If the Michigan court was right in holding that the complainant owned no real estate title, then, of course, the Michigan statute against alienation of mining property referred to would have no application. But that court being in error in its determination of the federal question, holding that complainant had no title; that error is the *fundamental* one and is the reason given for rejecting the conclusive defense, that the officers of the complainant *could not convey title unless authorized by three-fifths in interest of the stockholders of the company.* If the holding of the court *claimed* to be an *independent* one, involves the prior determination of a federal question and rests upon it and is ancillary to and subservient to it and is not broad enough and distinct enough to stand alone without such determination, then it is *not* such an *independent* determination. Such we insist is the case at bar. Our contention is,

First. That this pumping contract was not a conveyance of the real estate rights of complainant in any way. That there was no such intention on the part of

even the mining agents and mining superintendents who had to do with making the contract.

Second. That even if they had so intended, that the contract is absolutely void as a conveyance, as it was without the sanction and authorization of three-fifths in interest of the entire stock of the corporation, and that nothing can give vitality to such a contract, to convey the realty of the mining corporation. The only basis upon which the court below holds the contract valid as a conveyance of land is by first holding that the "complainant was *not alienating, dividing or "selling* any of its *real estate* within the language of "the statute. Alienating means in law *a transfer of "title* by conveyance" (76 N. W. Rep. 403. Also p. 262 of the Record).

It is difficult to understand *what* the learned judge delivering the opinion *meant* by the statement that there was no transfer of title, when it is beyond question that the territory lying *between the "center" of the lake and the south line of section 10*, opposite lots 2, 3, 4 and 5 of section 15, amounted as shown by the proof, to *about thirty acres.* What can that pumping contract be but a conveyance of the title of the thirty acres, by whatever name it may be called, if it conveys the rights and title of complainant to said land? But, says the learned judge in the opinion, on the same page from which we have quoted, "It may be said that the *statute "does not apply* to the voluntary adjustment of these "*lines*, but to alienation by deed of conveyance." The circumstances of this case do not show an *adjustment of lines.* It was the determination of *who owned thirty acres of territory acquired from the United States government by patent surrounded by independent lines*, which the bill asked the court to definitely and equitably locate. The learned judge in the court below

speaks of this matter as though it were merely the *adjustment of border lines*, as a line between two lots of a city, as to just where that line should be between adjoining owners. That is not the case. The fundamental inquiry is whether or not the complainant or defendants acquired title to the territory abutting lots 2, 3, 4 and 5 of section 15, under the waters of Lake Angeline, and to its center, amounting to over *thirty acres.*

After stating the facts, the first determination made by Justice Grant in the lower court was as follows: "No fixed rule ever has been, or ever can be laid down "for the '*division*' of the territory covered by these "inland lakes with irregular shores. Each case must "depend upon its own peculiar circumstances and facts. "and as reasonable a *division* arrived at as possible."

See 76 N. W. Rep. p. 401.

This is undoubtedly correct, and was the occasion of our filing the bill. The learned judge does not speak of it there as *simply settling a boundary*, but as a "*division*" of the territory covered by the inland lake, *which it was;* a conveyance, or an *attempted conveyance*, if anything more than a contract for pumping the water was intended.

The next holding in the opinion of Justice Grant on the same page is as follows: "The first obstacle for "the complainant to remove, before resorting to an "equitable apportionment is this contract (pumping "contract), recognized as valid and acted upon for "nearly five years by all parties." It was a contract for pumping and draining the mine only.

The next holding in that opinion is as follows: "We "find that the parties in reliance upon that case, en-"tered into a deliberate contract (pumping contract) "establishing their *boundary line, and determining the*

"*amount of territory belonging to each;* complainant "made the contract with the knowledge that it gained "territory south of the line known to be valuable, while "it *surrendered* territory north of the line not then "known to possess any value."

Thus, the court below holds the validity of the contract, subsequently holding as we have pointed out, because the statute of Michigan against alienation *did not apply.*

Again, on the same page of the opinion, the court below held as follows as to the pumping contract: "The "agreements and settlements of parties, made with full "knowledge of the facts and in reliance upon the law, "ought to be as binding as the judgment of a court in "a particular case * * * Judgments rendered, and "contracts made upon the faith of the law, as enunci- "ated in the decision of the court in the absence of "fraud or misrepresentation, must stand."

And again, "This case therefore, is to be decided "according to existing state of things when the settle- "ment in question took place" (referring to pumping contract); and on the next page of the opinion, the court says: "The sole basis of complainant's claim is, "that the decision of this court, upon the faith of which "the contract was made, was subsequently overruled."

Again holding on the same page, "Does the contract "settle the boundary line, and acquiescence therein, "and the acts done thereunder, *estop* complainant to now "assert a different line? The rule is settled by the de- "cisions of this court, that where *disputed boundary lines* "have been established by express agreement, or under "such circumstances, that an agreement will be im- "plied, and parties have for any considerable time "recognized them, they will be upheld, though title by "adverse possession could not be maintained."

And again, on the same page of the opinion the court held, "If his testimony be true (referring to Kidder, "the mining agent), and for this purpose the company "must stand by its own testimony, there was a dispute, "and it was settled by the agreement." (Pumping contract.)

Again, the court held, "Complainant, however, *in-*"*vokes* the doctrine that *title* to land *cannot rest on* "*estoppel, on account of the statute of frauds, and that* "*a vote of three-fifths of the entire stock of the company* "*is essential under the statute to convey title.* The ob-"vious reply to the first position is, that it is also es-"tablished that the statute of frauds does not apply to "*boundary lines*, and that the doctrine of estoppel will "be applied to the voluntary adjustment of disputed "boundaries."

Again holding, "Under the theory of complaint, "corporations could not settle *boundary* lines without "a meeting of the stockholders, called to pass upon the "*alienation* of its lands, etc."

And then, in the *opinion*, we come to the quotation referred to above, in discussing the federal question: "The Cleveland Iron Mining Company *claimed title by* "*virtue of the original patent.* The complainant *owned* "*no specific piece of land north of the section line*, even "under its own theory, which could be measured by "metes and bounds; how much, if any, it owned could "*only* be determined by agreement, or the decree of a "court of equity."

The above quotations cover the substance of the entire opinion, and the determination of the Michigan supreme court. The holding:

First. That the complainant *had no title in fee.*

Second. That, *having no title in fee*, the contract of the 17th of March, 1892, known as the pumping con-

tract, divided, apportioned and "*conveyed*" *every right which it did have* (the court not determining what that was), and that the *statute against alienation of corporate real estate had no application;* which conclusion *could not* have been arrived at except upon the theory that the determination of the *federal* question as made was correct. Incidentally, the court held that the complainant was estopped *by its contract* (the pumping contract) from asserting any title under the lake, thus *basing* the suggestion of estoppel upon the contract itself, as a valid one.

We submit that the entire determination on all the material questions in this case, were subservient to and *based* upon the erroneous determination of the federal question; and that the jurisdiction of this court should not be ousted, but that the entire record should be reviewed by this court.

It will be noticed that the court below does not intimate that the real estate of a mining corporation can be disposed of by conveyance, without a three-fifths vote of the stock in interest. In fact, by inference, affirms former holdings of that court that it cannot; only says the statute does not apply here.

Justice Cooley, of the Michigan supreme court, in earlier cases, delivering the opinion of that court, referring to this Act protecting stockholders against any acts or omissions of the corporate agent, or other persons, uses the following language: "This act was passed "to protect the interest of stockholders in mining com- "panies. It intends that their mining property *shall "not be conveyed away or mortgaged, except by their de- "liberate action after they have been notified of a proposal "to do so, and have had time to deliberate upon and fully consider it.*"

Beecher v. M. & Rolling Mill Co. 45 Mich. 103, 107.

Lockwood v. Thunder Bay Co., 42 Mich. 539.
Hartford v. Cambria, 80 Mich. 495.

And Judge Campbell, one of Michigan's ablest supreme judges, delivering the opinion of that court, referring to this statute requiring the *recording* of the *action* of the stockholders, referred to above, held: "Provision was made for obtaining and *recording* evi- "dence of such action * * *The deed is not made "presumptive evidence of the rightful character of the "sale."*

M. H. & O. Ry. Co. v. Atkinson, 44 Mich. 167, 168.

Thus holding that it must *affirmatively* appear by proof *not contained in the deed*, that the statute has been complied with. There is no such proof in the record.

In a recent case in the U. S. Court of Appeals, 6th Circuit, 90 Fed. Rep. 637, Judge Lurton, delivering the opinion of the court, construing this statute for the protection of the stockholders in Michigan, used the the following language:

"The general purpose of the statute was to protect "the interest of share holders in mining companies. "In Beecher v. Mill Co., 45 Mich. 103, Mr. Justice "Cooley interprets the act by saying, "It intends that "the mining property shall not be conveyed away or "mortgaged except by their deliberate action. That "the limitation is upon the alienation or encumbrance "of mining property as distinct from property not re- "quired in the conduct of the business for which the "company was organized, is evident from the descrip- "tion of property to which the prohibition applies. "The prohibition is against alienation or encumbrance "*of the mine works, real estate or franchise. By real*

"*estate we must understand from its association with "mine works and franchise that species of real estate "useful or valuable in connection with its mine works or "franchise.* This interpretation is made more evident "by the terms of the proviso which expressly authorizes "by the vote of a majority of the directors the sale of "city or village lots and lands from which the timber "has been removed, not required for mining purposes."

"There can be no estoppel *when there is no legal "power* to do the act, in reference to which it is claimed "the estoppel exists, i. e., parting with this land. The "officers, directors and agents could not by direct con- "veyance transfer title. *Neither can they by acts or "omissions.*"

O. & M. Co. v. O. Co., 130 U. S. 1, 37.
Pa. R. R. Co. v. St. L. R., 118 U. S. 290, 317.

The supreme court of Michigan in its opinion in this case could not have intended to hold, as an independent determination, that a title by estoppel was created, *independent of the pumping contract referred to;* because it has many times been held by the court, that "*title to "land cannot pass by a mere estoppel, shown by parol;* "neither can an apparent title be assailed by the parol "evidence of one who has caused its transfer."

First National Bank of Kalamazoo v. McAllister, 46 Mich. 398-406.

And Justice Cooley, in Hayes v. Livingstone, 34 Mich. 384, held: "*Title to lands can not pass by estop- "pel;* and if the plaintiff claims, *not* the title but the "right of *permanent possession*, this comes to the same "result. Citing Nims v. Sherman, 34 Mich. 45."

And in the case of John Hancock & Co. v. Dix, decided Sept. 14th, 1897, by the Michigan supreme court, 114 Mich. 337, it was held in the language of Justice

Hooker, that "It is well settled in Michigan, *titles in "land cannot rest on estoppel in pais.*"

So it is clear that when Justice Grant uses the language: "The complainant *was estopped by its own con- "tract from asserting any title* under the lake," he referred to estoppel by the pumping contract, and upon the theory that the contract was a valid one for that purpose. So there is no determination by the supreme court of Michigan that does not rest upon the erroneous determination of the federal question.

IV.

The Complainant Acquired Title to the Center of the Lake.

It has been established beyond controversy by the United States courts, that the abutting owner on an inland lake or river not navigable, acquires title to its center, though he pays only for the acreage of the upland, according to the survey of the surveyor general.

In the case of St. Paul & Pacific Railway Co. et al v. Schurmeier, 7 Wall. 272, it was held as follows: "Meander lines are run in surveying fractional portions "of the public lands bordering upon navigable rivers, "not as boundaries of the tract, but for the purpose of "defining the sinuosities of the banks of the stream, "and as the means of ascertaining the quantity of the "land in the fraction subject to sale, and which is to "be paid for by the purchaser. * * * Proprietors "bordering on streams not navigable, unless restricted "by the terms of their grant, *hold to* the *center* of the "stream; but the better opinion is, that the proprietors

"of lands bordering on navigable rivers under titles de-
"rived from the United States, hold only to the stream,
"as the express provision is that all such rivers shall
"be deemed to be public highways. Grants of land
"bounded on rivers above tide water; says Chancellor
"Kent, carry the exclusive right and title of the grantee
"to the *center* of the stream, unless the terms of the
"grant clearly denote the intention to stop at the edge
"or margin of the river; and the public, in cases where
"the river is navigable for boats and rafts, have an
"easement thereon, or a right of passage subject to the
"jus publicum as a public highway. 3 Kent's Co., 11
"Edition 427. The views of the commentator are, that
"it *would require an express exception in the grant* or
"some clear or unequivocable declaration, or certain
"immemorial usage, *to limit the title of the riparian*
"*owner to the edge of the river*, because as the commen-
"tator insists, the stream when used in a grant as a
"boundary, is used as an entirety *to the center of it*, and
"he consequently holds *that the fee passes to that extent.*
"Decided cases of the highest authority affirm that
"doctrine, and it must doubtles be deemed correct in
"most all jurisdictions, *where the rules of the common*
"*law prevail*, as understood in the parent country.
"Except in one or two states, those rules have been
"adopted in this country, as applied to rivers not nav-
"igable, when named in a grant or deed, as a boundary
"to land. Subsequently the same rules were adopted
"by congress as applied to streams not navigable; but
"many acts of congress have provided, that all navig-
"able rivers or streams in the territory of the United
"States offered for sale should be deemed to be and
"remain public highways.

1st Statute at Large, 491.
2nd Statute at Large, 235, 279, 642, 666, 703, 747.
3rd Statute at Large, 349.

"* * * Extended discussion of this topic, however, "is unnecessary, as the court decides to place the de- "cision in this case, upon the several acts of congress, "making provision for the survey and sale of the "public lands, bordering on public navigable rivers; "and the *legal construction of patents* issued under "such official surveys, and sale of such lands, *must "have the same effect* as it would be entitled to receive "if it were incorporated *into the patent*, especially as "there is nothing in the field notes, nor in the official "plat or patent inconsistent with that explicit reserva- "tion. * * * Viewed in the light of these con- "structions, the court does not hesitate to decide, that "congress, in making a distinction between streams "navigable, and those not navigable, intended to "provide that the common law rules of riparian owner- "ship should apply to lands bordering on the latter; "but that the title to lands bordering on navigable "streams, should stop at the stream, and that all such "streams should be deemed to be and remain public "highways."

In the case of Hardin v. Jordan, 140 U. S. 402, the court held as follows: "It has been the practice of the "government, from its origin, in disposing of the public "lands, to measure the price to be paid for them, by "the quantity of upland granted; no charge being "made for the lands under the bed of a stream or *other "body of water.* The meander lines running along, or "near the margin of such waters are run for the pur- "pose of ascertaining the exact quantity of the upland "to be charged for, *and not for the purpose of limiting "the title of the grantee to such meander lines.*"

In Barney v. Keokuk, 94 U. S. 324, and Packard v. Bird, 137 U. S. 661, and Hardin v. Jordan, 140 U. S. 402, it was held: That the beds of streams, above the

flow of the tide, whether actually navigable or not, *belonged to the proprietors of the adjoining lands.*

St. Louis v. Ritz, 138 U. S. 226.

In the case of Hardin v. Jordan, 140 U. S. 402, the court uses the following language: "The disposal of "the present case, therefore, seems to us to require no "further discussion—only an answer to the single ques- "tion *what is the common law in regard to the title to "fresh water lakes and ponds?* And on this subject we "think there can be very little difference of opinion. "Of course, as already stated, there is no question "*where the land fronts upon a fresh* water stream or "river. In such cases the law is perfectly plain. Sir "Mathew Hale states: Fresh rivers of what kind soever, "do of common right *belong to the owners of the soil ad- "jacent;* so that the owners of the one side have of "common right the property of the soil, and conse- "quently of the right of fishing usque ad filium aquæ, "and the owners on the other side, the right of the soil "and fishing under the filium acquæ on their side."

So it is clear, that the complainant acquired title to the *center* of this inland lake. Certainly this is so, unless the patent to Burnell, through which the Cleveland Iron Mining Company claims title by its description, "east half of 10 and west half of 11," carried title to the south line of 10, projected through the lake. No executive of the government, charged with the duty of selling the public lands and issuing the patents, could vary the uniform rule as to title to purchasers by any form of patent of abutting lands on inland lakes, ponds or rivers, as the United States courts have frequently held, that "registers of local land offices are mere sales "agents of the government. The survey and division "of the lands are entrusted to the surveyors. Their "action is conclusive, and the registers are bound to

"sell by the plats furnished them. They can sell in "no other manner."

Kissell v. St. Louis Public Schools, 18 How. 19.
Bagnell v. Broderick, 13 Peters 450.
Barnard v. Ashley, 18 How. 43.
West v. Cochran, 17 How. 403.
Gazzam v. Lessee of Philips, 20 How. 372.

In Gazzam v Lessee of Philips, 20 How. 372, the court held, that the surveyor general had power to make fractional subdivisions of fractional sections of public land containing more than eighty acres. In fact that he had discretion as to the form of division of public lands, and the description of those divisions; the court in that case overruling Brown v. Clements, 3 Howard 650. In fact it is the settled law of the United States courts, that the descriptions as made of the surveys by the surveyor general are controlling; and when the patent is of the lands of a governmental description, according to government survey, and is of a "fractional" portion of land fronting upon an inland lake or water, according to government survey, *these are the controlling words* and limit the amount of land to be paid for to the acreage of the fractional description as determined and entered by the surveyors in their minutes and upon their maps. So the patent to Burnell, which described the land conveyed as the "east half of 10 and the west half of 11, according to government survey", conveyed by metes and bounds only the acreage as specifically stated by the surveyor general as the acreage of each "fractional" lot within the limits of what would be the east half of section 10 and the west half of section 11; namely 555.15 acres, *the specific acreage stated in the patent* and appearing by the government plats offered in evidence to be the acreage of the *uplands* according to government survey; and all title which Burnell obtained under his patent to a portion

of the inland lake (which would be to the center of the lake) was by virtue of the *law of riparian ownership* as referred to above, and not by virtue of the wording of the patent itself; and no title was acquired by Burnell, or conveyed by him to the Cleveland Iron Mining Company beyond the center of that lake.

Section 464 of the United States Statutes at large, provides that the field books of the surveyor general shall be returned by the surveyor general, who shall thereafter cause a description of the whole lands surveyed to be made out and transmitted to officers who may have to superintend the sales, which is to be recorded and be in the possession of the parties who make the sales, and presumptively for use in such sales.

In the case of Parker v. Kane, 22 How. page 11, the court held: "that a description as a lot necessarily re-"fers to the official surveys in the general land office, "to which the court looks for the final determination "of the matter;" and which the statutes of the United States provides shall be the means of finally determining both the description and quantity of lands conveyed.

In the case of Willson v. Hoffman, 70 Mich. 527, the court held as follows: "In granting patents for lands, "it is usual for the government to add immediately af-"ter the statement of the number of acres which the "tract contains, if it be fractional, these words: 'ac-"cording to the official plat of the survey of said lands "returned to the general land office, by the surveyor "general.' Such language, when used, constitutes a "part of the description of the premises conveyed, and "*limits* the purchaser to the tract as marked upon the "plat of the surveyor general. This was so held in "Gazzam v. Lessee of Philips, 20 Howard 372, which

"overruled Brown's Lessees v. Clements, 3 Howard "650. This was the language used in the patent to "Tingley."

Thus, the description in the patent to Burnell, that it was *555.15 acres, according to government survey*, fixed as a *limitation* to the description and amount of the lands conveyed; namely, the fractional lots abutting upon the inland lake in question; and any right acquired under said patent in the land under the lake, was by virtue of riparian ownership. which was *only to the center of the lake.*

In the case of Packard v. Bird, 137 U. S. 661, the court uses the following language: "The disposal of "the present case, therefore, seems to us to require no "further discussion: only an answer to the single ques- "tion—what is the common law in regard to the title "*to fresh water lakes and ponds;* and on this subject "we think there can be very little difference of "opinion. Of course, as already stated, there is no "question where the land fronts upon a fresh water "stream or river. In such case the law is perfectly "plain. Sir Mathew Hale states: '*Fresh rivers of "what kind soever, do of common right belong to the "owners of the soil adjacent;* so that the owners of the "one side have of common right the property of the "soil, and consequently of the right of fishing usque "ad filium aquæ, and the owners on the other side, "the right of the soil and fishing under the filium "aquæ, on their side'."

In the case of Hardin v. Jordan, 140 U. S. 402, the court held as follows: "It has been the practice of "the government from its origin, in disposing of the "public lands to *measure* the price to be paid for them "*by the quantity of upland granted, no charge* being "made for the lands *under* the bed of the stream *or*

"*other body of water.* The meander lines running "along or near the margin of such waters are run for "the purpose of ascertaining the exact quantity of the "upland to be charged for, *and not for the purpose of "limiting the title to the grantee to such meander lines.* "It has frequently been held, both by federal and "state courts that such meander lines are intended for "the purpose of bounding and abutting the lands "granted upon the waters whose margins are thus me- "andered, and that the waters themselves constitute "the real boundary."

St. Paul & P. R. R. Co. v. Schurmeier, 74 U. S. (7 Wall.) 272.
Jefferies v. E. Omaha Land Co., 134 U. S. 178.
P. Marquette Boom Co. v. Adams, 44 Mich. 403.
Clute v. Fisher, 65 Mich. 48.
Revised Statutes of the U. S. Sec. 2395, 2396.

"The beds of streams above the flow of the tide, "whether actually navigable or not, *belong to the pro "prietors of the adjoining lands.*"

Barney v. Keokuk, 94 U. S. 324,
Packard v. Bird, 137 U. S. 661,
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In the case of Gazzam v. Lessee of Phillips, 20 How. 372, the court held that the surveyor general had the

power to make fractional subdivisions of fractional sections of public land containing more than eighty acres; in fact, that he had discretion as to the form of division of public lands, and the description of those divisions; the court in that case overruling the case of Brown v. Clements, 44 U. S. (3 Howard) 650.

In fact it is the settled law of the United States courts that the descriptions as made of the survey by the surveyor general are controlling; and when the patent is of lands of a governmental description, "according to government survey," and is of a fractional portion of land fronting upon an inland lake or water "according to government survey," these are the controlling words and limit the amount of land covered to the acreage of the fractional description determined and entered by the surveyors in their minutes and upon their maps. So that in the case of the patent by the United States to Burnell, which describes the lands conveyed as "the east half of 10 and the west half of 11, according to government survey," it conveyed only the acreage as specifically stated by the surveyor general, as the acreage of each fractional lot within the limits of what would be the "east half of section 10 and the west half of section 11," if the south lines were extended through the lake, and the amount of territory conveyed was the total of those fractional lots, namely 555.15, which it will be noticed is the specific amount of acreage stated in the patent to Burnell. Thus making it plain that while the patent also speaks of the land conveyed as "the east half of 10 and the west half of 11," which, if there had been no portion of this inland lake within its limits, would have been 640 acres, it in fact limited the actual amount for which payment was to be made, and for which title was given by metes and bounds to the upland, viz: The government

fractional lots fronting upon this Lake Angeline within sections 10 and 11. Thus Burnell, and through him the defendant, The Cleveland Iron Mining Company, acquired title to all of those "fractional" subdivisions or lots of sections 10 and 11 fronting upon the inland lake, and by virtue of such frontage, under the law as above pointed out, acquired ownership to that portion of the lake abutting their ownerships of these subdivisions to the center of the lake only, and to the point where the complainant alleges its title to extend, by virtue of its ownership to the center of the lake from the south side of the lake.

It will thus be seen that there is no force whatever in the allegation of the Cleveland Iron Mining Company, and in the arguments made by its counsel in the court below, when they assert that by the words of the patent to Burnell they received absolute title to 640 acres, instead of 555.15, and that their title extended to the south line of sections 10 and 11, if extended east and west through the waters of this inland lake, and that it took in all of the lake to that line, if so projected.

In the case of Willson v. Hoffman, 70 Mich. 557, that court used the following language: "In granting patents for lands it is usual for the government to add immediately after the statement of the number of acres which the tract contains, if fractional, these words, 'according to the official plat of the survey of said lands returned to the general land office by the surveyor general.' Such language when used constitutes a part of the description of the premises conveyed and limits the purchaser to the tract as marked upon the plat of the surveyor general.

This was so held in Gazzam v. Lessee of Philips, 20 Howard, 372, which overruled Brown's Lessee v. Clem-

ents, in 3rd Howard 650. This was the language used in the patent to Tingley.

Thus the description in the patent to Burnell, that it was 555.15 acres, "according to government survey," fixed the limitation and description of the lands conveyed, namely, to the fractional lots abutting upon the inland lake in question.

Upon the hearing of this case the plat book of the United States government, kept in its local land office at Marquette, was offered in evidence, containing two maps, one showing the township in question and the inland lake, with the fractional lots surrounding it, and the acreage in each lot marked thereon. This map is Exhibit "C", page 34 of Record; the other showing the same township from the records of the local Marquette United States land office offered in evidence as Exhibit "E" of Record, page 36, showing the same inland lake and the lots surrounding it, with the acreage marked thereon; also showing on the margin the meander courses and distances of the survey of the lake made by the surveyor general. This was also offered in evidence, together with the meandered courses and distances made of the survey of the surveyor general, certified by the commissioner of the general land office. These courses and distances so certified are the same as appear on the margin of map Exhibit "E." This certified copy of courses and distances appears upon pages 34 to 36 of the Record. These maps, with the notes of the survey, taken together from the original record of the Marquette United States land office, constitute complete evidence of what the surveys were, and of the acreage contained in those government subdivisions.

Wilson v. Hoffman, 54 Mich. 247.

This showing by the maps was not necessary, as the

acreage stated in the patent to Burnell, as we have pointed out above, was 555.15 acres, but for abundant proof we offered it.

Section 464 of the U. S. Statutes at Large provides: That the field book of the surveyor general shall be returned by the surveyor general, who shall thereafter cause a description of the whole lands surveyed to be made out and transmitted to officers who may have to superintend the sales, which is recorded and to be in the possession of the parties who make the sales, and presumptively for use in making such sales. Does not the statement in the conveyance, made from such information so preserved as directed by the statute, furnish the descriptive quantity of the thing conveyed, as 555.15 acres, and does it not refer the purchaser to the maps and notes of the survey, which show the lands to be fractional subdivisions, containing that amount of acreage abutting upon the margin of an inland lake, when in the patent it is stated that the conveyance of the land is "according to government survey."

It seems to us there is no room for doubting that when the general description of the government subdivision known to contain forty acres, unless fractional is stated to contain much less than the forty acres, it shows that it is fractional, and that it is so purchased and so conveyed by the patent, as such from the description in the "field book" of the surveyor general, which field notes are required by the act of congress to be preserved and furnished to the local United States land office, whose duty it is to sell and convey.

Revised Statutes of the U. S., sections 2395, 2396, 2397.

In the case of Mann et al v. Pearson, 2 Johnson's

Reports (N. Y.) 371, it is stated that there was a sale of a definite description of land as *lot numbered 78* in the township of Lysander, *containing 680 acres.* It turned out that it *contained only 424 acres and one-eighth.* Suit was brought for *damages* upon the bond given for the sale, because the lot did not contain 680 acres. This lot 78 was a *subdivision according to the laws of the state of New York.* Judge Spencer in delivering the opinion of the court said, "I understand the prem-"ises were sold, as fully and definitely described as if "metes and bounds had been used in ascertaining the "thing granted, and so must the parties have under-"stood it. Also all of the lands in the counties of "Cayuga, Onondago and Senaca have been surveyed "into lots by the surveyor, which, under the public "acts, and pursuant to the directions of these acts, "maps have been returned to the office of the secretary "of state, on which patents have been issued. *It can-"not be* pretended therefore, that, when the parties "contracted about a lot defined by number, town and "county, that they did *act with reference to the maps* "describing and designating this lot in the secretary's "office. It necessarily followed that the subject mat-"ter of the apportionment was precisely ascertained."

This New York court thus holding, that the party purchasing was referred back to the record as made by the surveyor general and kept by the government for a statement of the acreage conveyed in lot 78, which, we insist, would be the case as to the United States patent made to Burnell in the case we are considering.

So that not only by the patent itself is the acreage stated to be 555.15, but, the records and maps made by the surveyor general show the same thing, and are offered in evidence and makes it conclusive that there was conveyed to Burnell *only 555.15 acres*, the up-

lands, *by metes and bounds*; and that any title acquired by him, or his grantee, The Cleveland Iron Mining Co., was by virtue of the law which gave it *title* to portion of the inland lake to its "*center*," and to all the abutting owners in proportion to their shore frontage, and not by virtue of a description of "east half of 10 and west half of 11" in the patent itself.

Washburn on Real Property, Vol. 3, page 402, states the rule as follows: "Sometimes the quantity of land "conveyed is mentioned in the deed, but independent "of an express averment or covenant as to quantity, "this is always regarded as part of the description "merely, and will be rejected if it be inconsistent with "the *actual area* of the premises, if the same is indi- "cated and ascertained by known monuments and "boundaries. It aids, but ordinarily does not control "the description of the granted premises."

In the case of Park v. Kane, 22 How. 11, the court held that "A description as a lot necessarily refers to "the official surveys in the general land office, to which "the court looked for the final determination of the "matter."

V.

Has Complainant Parted With Its Title North of the South Line of Section 10? If So, How?

It appears from the testimony of Mr. Kidder that he was the agent for the complainant in charge of its local business and financial affairs at its mine on Lake Superior. That he had nothing to do whatever with the

sale or disposing of its real estate. That the company has been carrying on mining operations there since 1864 on the north half of the north half of section 15, being lots 2, 3, 4 and 5 of that section. That it commenced mining operations in the fall of 1863. That they began mining operations for iron ore on these lands by surface work on the side of the hill, which was close to the lake. That as they mined into the side of the hill the waste rock was carried and dumped into Lake Angeline, filling up the lake for quite a distance, maintaining the shore level as the fill was carried out into the lake. That by 1895 the lake was filled up some distance out, and for an area of about five acres north of the south line of section 10. That complainant erected buildings on the territory north of the south line of section 10, consisting of carpenter shop, erected in 1884, partly on this made ground north of the south line of section 10 and partly across the section line, on filled ground south of the south line of section 10. The carpenter shop cost about $1,800 to $2,000, and was a frame building covered with corrugated iron, size something like 30x60; it was a well constructed building, designed for housing tools. Complainant also constructed a blacksmith shop on section 10 of this made land. This was a frame building, bricked between the studding, covered with corrugated iron on the sides and roof, and also cost about $2,000. Complainant also constructed other buildings on this made territory north of this south line of section 10. It also moved a supply house over onto this made ground in 1885, which was about 20x24 feet. It also placed a pump house and engine house on the land over the line in 1887; also a powder house and an ice house. (See pp. 84 to 86 of Rec.)

Mr. Kidder stated that he learned from Mr. Mann

of Milwaukee in 1887, that there had been a decision by the supreme court of Michigan, allowing parties owning any part of a government subdivision fronting on an inland lake to fill out the lots from the inland lake, to the full size of government subdivisions; and from looking at the map he saw that if it was true it would give the territory north of the south line of section 10 to The Lake Superior Iron Company. That he went to Mr. Clark, an attorney, for an opinion in the matter. Mr. Mann had told him that the supreme court decision would be found in the North Western Reporter. It was the decision in the case of Clute v. Fisher, 65 Mich., page 48. That the information which he received from Mr. Mann and the opinion from Mr. Clark caused him to move some of the shops over the section line onto section 15, because he considered the buildings too valuable to leave in a position where the ownership might be jeopardized. That he moved over only the machine and carpenter shops. The other buildings he left there; that is, the powder house, blacksmith shop, the cheaper one, and the other buildings that he mentioned. That the complainant has been in occupation of filled ground north of the south line of section 10 ever since, with those buildings which remain there now. That after he learned of the decision of Clute v. Fisher, he understood that it restricted complainant's ownership to the north line of section 15 in the bed of Lake Angeline (see pp. 86 to 88 of Record).

Mr. Kidder stated that after he learned of the decision in Clute v. Fisher, and from that time to the decision of the case of Ice and Coal Co. v. Ice and Coal Co., 102 Mich., decided by the supreme court of Michigan in 1896; his understanding was, that the case of Clute v. Fisher restricted complainant's ownership to

the north line of section 15 in the bed of Lake Angeline. That he heard February 8th, 1896, that by the decision of Ice and Coal Co. v. Ice and Coal Co., 102 Mich., the case of Clute v. Fisher had been overruled (see p. 87 of Record). That he received such information from Mr. Clark at that time (see pp. 87 and 88 of the Record).

It thus appears that from 1863 until 1887 the complainant was operating its mine dumping its waste into Lake Angeline, taken from the ore body in the open "pits" as mined, until it had not only filled up a portion of the lake south of the south line of section 10 projected through the lake amounting to 5.27 acres (see map Ex. F, p. 40 of Record), but also about five acres north of this south line of section 10. That it had erected valuable buildings, consisting of machine shop, blacksmith shop and other buildings on this filled ground now in dispute, costing about $5,000, which it had occupied for many years in connection with its mining. That the complainant claimed to own this territory to the center of the lake, and had occupied it under such ownership for those many years.

Mr. Kidder further testified, on cross-examination, that the the carpenter shop and the other buildings were built north of the section line because of the understanding that their property extended north of the line by means of their riparian rights. That the water of the lake extended south of the line, and that they had filled it up with waste from the mine. That he understood that their title extended north of the line because of the riparian ownership from the shore. That this understanding remained so until he was informed of the decision of the supreme court in Clute v. Fisher, 65 Mich. 48. That he asked Mr. Clark his opinion about it, when he advised him in substance

that *under that decision* their ownership would be limited by the north line of section 15. That he then as a matter of precaution moved the more valuable buildings south of that line in order to save them in case this opinion proved to be correct. That he accepted this opinion so far as *to govern his actions.* That he understood it to be only a matter of opinion, but did understand that the opinion of the supreme court was controlling. That he was aware that courts sometimes change their opinions and that he had frequently thought that with reference to this very thing—that the supreme court might change sometime. That afterwards Mr. Clark informed him that the supreme court had changed its opinion and cited authorities which he thought were sufficient to show that. That he considered it a report on the action of the supreme court. That he didn't consider it was Mr. Clark's individual opinion. That it was a statement of the action of the supreme court which he gave him, and which he could read for himself, and could form an opinion on the condition of the law when he read the extracts from the supreme court decision in the case (see pp. 101 and 102 of Record).

The witness further stated, that the date when he was first informed of this decision in the "Ice & Coal Co. case," over-ruling Clute v. Fisher, was February 8th, 1896, and that there was notice given to the defendants October 29th of complainant's rights north of the said line; given by his direction. (See pp. 99 inclusive of the Record.)

Mr. Kidder further testified: I heard the last of December, 1895, that the supreme court had changed its views expressed in the Clute-Fisher case, and then went to Mr. Clark, who took some time to write his opinion, which he gave me February 8th, 1896. When

the pumping contract was made (which was dated the 17th of March, 1892), I understood our premises stopped with the south section line of 10. (See pp. 87, 102 of Record).

He further testified:

Q. Instead of making your contract (pumping contract) with a view of that ledge of rock (diorite), you made it with a view of the section line, as the division between your properties? A. *O, no. We didn't consider it as a division between the properties at all;* that was simply a circumstance which affected the water question. The fact that the diorite division rock kept the water in on the south side kept it there.

Q. In making the contract what you intended to provide for was the protection of your property south of the section line? A. Protection?

Q. Yes; and accommodation of your workings in your property which lay south of the section line? A. Protection for what—I don't understand?

Q. Protection from water? You wanted to get rid of the water that interfered with your workings south of the section line? A. We couldn't get rid of any water unless we took it away ourselves. The very point was that diorite would prevent the water from draining out of our fold, into that north fold.

Q. Was not in negotiating the contract the end which you sought, to care for your property south of the section line; was it not? A. Why, it was to prevent our paying for the pumping of water which would not do us any good.

Q. To express it in another way, you didn't at that time understand that you were interested in any property which might be found to exist north of that section line? A. No, we didn't at that time understand that we were interested in anything north of that line.

Q. *And you contracted with reference to that fact?* A. *Yes—well that fact didn't govern it; that fact wasn't thought of at that time—cut no figure.*

Q. *What wasn't thought of?* A. *The fact that we didn't own anything north of that section line. It had nothing to do with it.*

Q. If your mining rights extended as you now claim them north of the north line of section 15, you would be interested in keeping the body of the lake pumped out would you not? A. No sir.

Q. Now, now? A. No sir. The thing is just as true to-day as it ever was. My position would be just the same certainly.

Q. You mean the main body of the lake? A. Yes, the main body where the pumping station is; where the permanent drainage is affected.

Q. North of diorite? A. North of the diorite. *It is just as true to-day as it ever was.*

Q. If your premises extend to the entire territory within that dotted line (showing complainant's claim of territory north of the south line of section 10) would you not be interested in the water which would be gathered here in the center of the lake? A. There is where that diorite comes down, right through there (indicating). So far as we know and have every reason to believe, that diorite lies like that—forms one corrugation. (See pp. 103 and 104 inclusive of the Record).

Q. You drew the contract with reference to the south line of section 10 in reference to your property rights, did you not? A. Yes.

Q. Then you were dealing with that as your boundary, were you not? A. Yes, under that same impression in Clute v. Fisher (referring to pumping contract of March 17th, 1892.) (See page 105 of the Record).

Mr. Kidder further testified on cross-examination:

Q. You remember in 1880 or 1881 having a conversation with Mr. Morse and with Mr. Bacon, then captain of the Cleveland mine, in regard to the south line of section 10 being the boundary between your two properties? A. I remember Mr. Morse's coming to me and asking me—

Q. Wasn't Mr. Bacon with him? A. I don't remember. I remember Mr. Morse coming to me and asking me to sign a paper of some kind—a letter of recommendation to our people, that they should sign a *quit-claim deed* of *everything north of the south line of 10*, and stating at the same time that the Lake Superior Iron Co. and the Cleveland were to exchange deeds of that sort, and that they would also deed to the Lake Angeline everything south of the south line of 10.

Q. I am not talking about 15; I am asking you about the conversation you had with Mr. Bacon and Mr. Morse in 1880 or 1881; do you remember any such? A. No, I don't.

Q. In which you referred to the south line of section 10 as the boundary line? A. I don't at all remember anything of that kind.

Q. You remember Mr. Bacon and Mr. Morse coming over there and your mentioning that there was a center post there right at the end of lot 6, so-called, dividing lot 6 into two parts—a quarter post—and stating to Mr. Morse and Mr. Bacon that the Cleveland Iron Mining Co. owned a little portion of that lot lying to the east of that quarter post, and also stating that the section line, the south line of the section, was the boundary between the properties of the Cleveland Iron Mining Co. and the Lake Superior and the Lake Angeline? A. I have no recollection of any such thing at all.

Q. *Do you say positively that no such conversation*

occurred? A. *I should say so most certainly. I have not the slightest recollection and I think I should have, because that is not the position I took at that time.*

Q. Do you remember any conversation you had with Mr. Morse and Mr. Bacon on that subject? A. I only remember that application Mr. Morse made to me, and *I remember my answer very distinctly* when he asked me to recommend to our company that they sign a quit-claim deed of everything north of the line.

Q. You didn't want to do it? A. *I told him I wouldn't think of doing such a thing.*

Q. When was that? A. I couldn't tell you; *I should say it was about 15 or 16 years ago.*

Q. Was it prior to the year 1880, at the time Mr. Morse was agent? A. Mr. Morse was agent of the Cleveland Iron Mining Co.

Q. Was anybody present at the interview? A. I don't remember that there was at all. I know what my mental attitude was at that time on the subject. *I know I thought decidedly that we owned to the center of the lake. I always thought so until this matter of Clute v. Fisher came up.*

Q. Did you make any claim of that kind? A. *I told Mr. Morse so.* We had no object—*we occupied the territory with buildings. We dumped over there and used it right along as if it were ours.*

Q. You didn't occupy any territory west of the center line of section 10? A. No; *we had no occasion to.*

Q. You say you found out in regard to this decision of Clute v. Fisher in the fall of 1895. You located it, I think, sometime in December. A. Yes; you mean the other one?

Q. I mean the Ice Co. case against Ice Co. A. Yes, sir.

Q. You put it Dec. 30th. A. Yes, sir; about that.

(See pp. 108, 109, 110 of Rec.)

It thus appears from the testimony of Mr. Kidder, *that from 1864 to 1887 the complainant was in open and notorious possession of the property now in dispute, north of the south line of section 10.* That they had made a large acreage of ground, by filling in the debris from their mines located on the margin of the lake, and had erected valuable buildings on this territory; and that Mr. Kidder was asserting the ownership of the complainant to the "*center*" of the lake, and denied all rights of the defendant, The Cleveland Iron Mining Co., when Mr. Morse, agent, asked him to recommend complainant to quit-claim all its title and rights under the lake to the south line of section 10. Mr. Kidder then asserted to Mr. Morse, *that they owned the territory to the center of the lake, and that this had always been his claim and was up to the time* of learning of the decision of the supreme court of Michigan in Clute v. Fisher, 65 Mich. 48; and that he then thought, notwithstanding that opinion, that the supreme court might change that opinion; but that on account of that opinion he supposed that so long as it was maintained it would be the controlling law of the state, and that complainant was bound by it.

It also appears by Mr. Kidder's testimony that at the time Mr. Morse came to him, the complainant had not filled in any territory *east* of the north and south center line of 10—the territory claimed by the Cleveland Iron Mining Company—and had not erected buildings thereon, but only upon the territory lying west of the north and south center line of 10—the territory now claimed by the defendent, The Lake Superior Iron Company, which is the territory where complainant filled five acres north of section line and erected the buildings mentioned. It appears that this filling was done there because the complainant, when mak-

ing the filling in the lake, was mining *only* in open pits and in shafts just to the south of the west half of section 10 at the points indicated on complainant's Exhibit "F," where appears the drawing of mining pits, marked "open pit," in the ore formation marked "outline of ore body." But we insist that the occupation of this riparian ownership west of the north and south center line of section 10, if projected, was the occupation of the entire riparian right, as it was an ownership in an entirety, and not controlled by any section lines, for no such lines existed in the waters of the lake. They are simply referred to as descriptive, by complainant's and defendant's counsel, the same as if projected through the lake. The section lines ended at the meander line of the lake from either way.

It further appears from Mr. Kidder's testimony that to avoid the danger of losing the more valuable buildings, built upon the new made ground north of the south line of section 10, he caused them to be moved just over "the line" to the south, as they now appear on complainant's map, Exhibit F, marked "machine shop" and "carpenter shop". This he did as a matter of caution. There is no evidence that the board of directors of the company at Pittsburg, Pa., or the stockholders, knew anything about it at the time it was done. Mr. Kidder was in charge of the local mining operations and finances of the company at the mine, and whatever he did was according to his own judgment; and according to that judgmont, he not only moved the machine shop and carpenter shop south of the south line of section 10, but avoided doing anything that would conflict with the law as laid down by the supreme court of Michigan in Clute v. Fisher, 65 Mich.

Now, what was the determination in Clute v. Fisher, 65 Mich. 48, as to riparian rights?

The court held that the owner of a "fractional" subdivision of land, made so by an inland lake, *owns the soil under the water of said lake*, which would be included within a United States subdivision if its lines were extended into the lake, so as *to square out the fractional description*, and that such owner can maintain trespass against anyone who cuts and removes ice formed in the lake over such soil without his consent. The court in that case, discussing the matter, held as follows:

"It therefore becomes apparent that the true and "*only* rule to give effect and harmony to these decisions, "and *place the ownership of the bed of this lake in some* "*person or persons*, so that the extent and boundary "lines of *such ownership* may be easily *ascertained*, is to "*invest the holder of the title* to any fractional subdi- "vision of a section bordering upon this lake *with the* "*ownership of the bed of the lake to the lines of said sub-* "*division as they would be if continued through or into* "*the lake.*"

Applying this rule to the waters of Lake Angeline, and to the territory now in dispute, it will be seen that *squaring out* either lots 5 or 6 of section 10 would include the territory of the lake lying *west* of the north and south center line of section 10, and north of the south line of section 10, which would be to determine that the Lake Superior Iron Company owned the territory under the lake which it now claims, and in dispute in this case; and applying the same rule to the territory in the *east* part of section 10, squaring out lot 7 owned by the defendant the Cleveland Iron Mining Company, it would give to that company all of the territory east of the north and south center line of 10 now in dispute.

If the complainant had continued to assert ownership and possession in conflict with this plainly stated rule of ownership in Clute v. Fisher, 65 Mich., it would have been liable for trespass under the law, as stated in that case; because, in the language of Justice Field in Baltimore & Ohio R. R. Co. v. Bogue, 149 U. S. 370, "*The decision of the highest court in the state makes the* "*law which the citizen is compelled to follow until over-*"*ruled.*" The eminent justice in that case further held that: "The law of the state on many subjects *is found* "*only in the decisions* of the courts, and is equally oper-"ative as if *embodied in a statute.*"

"The law is to be discovered from the decisions of "the court as well as from statutory enactment. This "is a legal principle, old and firmly established, and is not subject to controversy.

Baltimore & Ohio R'y. Co. v. Bogue, 149 U. S. 370, 397.
Beecher v. Cheshire R'y. Co., 125 U. S. 555.
Detroit v. Osborn, 135 U. S. 492, 497.
Burgis v. Seligman, 107 U. S. 359.
Burgis v. Seligman, 107 U. S. Lawyers Co. Op. Ed. Book 27, p. 365 and cases there cited.

Under these circumstances, what could Mr. Kidder do as agent of this property but submit to the holding of the supreme court until there should be a *change* of the law? He, acting as a law abiding citizen, did not by *consent* give away legal rights of his principal. To claim that he did would be absurd.

It appears that the questions decided in Clute v. Fisher, 65 Mich. 48, came before the supreme court of Michigan in the case of Ice and Coal Co. v. Ice and Coal Co., 102 Mich. 228, for re-consideration. Ex-Justice Champlin, who was one of the justices of the supreme court of Michigan when Clute v. Fisher was decided, and who concurred in the opinion in that case, was the

attorney in Ice and Coal Co. v. Ice and Coal Co., attacking the accuracy of the decision in Clute v. Fisher, in which he had participated; and it is quite interesting to review his argument appearing in his printed brief on file in that court. On page 6, he says:

"It will be noticed that at the time Clute v. Fisher "was decided, I was a member of the court and con- "curred in the opinion filed. It is therefore with the "greatest diffidence that I am compelled to assert, that "the *reasons* given as the *basis* for the conclusions "reached were *based upon errors of my own.* A cele- "brated jurist has said, that following a decision which "upon a more careful consideration does not comport "with settled legal principles, or does not secure to the "individual acting under the restraint of a civilized "community or social compact, their just legal rights, "and thus applying *successively a wrong rule, is little "less than imparting immortality to error.* I take my "full share of the blame in putting the court in a wrong "position by the case of Willson v. Hoffman, 54 Mich. "246; and freely admit, that I followed the decision in "Brown's Lessees v. Clements, 3 Howard 665; and that "I was unaware that it had been expressly *overruled* "in Gazzam v. Lessee of Philips, 20 Howard 372. The "court followed Willson v. Hoffman, 54 Mich. 246, in "Kazer v. Sunderland, 59 Mich. 455, and in Palmer v. "Dodd, 64 Mich. 474."

Under the able review by Ex-Justice Champlain of Clute v Fisher, its doctrine was overruled by the Michigan supreme court; and Chief Justice McGrath, in delivering the opinion in Ice and Coal Co. v. Ice and Coal Co., 102 Mich. 227, in overruling Clute v. Fisher, used the following language: "A correct result "was reached in the Clute case; but the *reasons given "are without support.* That case and those upon which

"it relied were based upon Brown's Lessee v. Clements, "3 Howard 665, which was expressly overruled in "Gazzam v. Lessee of Philips, 20 Howard 372." The court overruling the doctrine as established by Clute v. Fisher, and establishing the law of riparian ownership as defined in Gazzam v. Lessee of Philips, 20 Howard 372, and in Hardin v. Jordan, 140 U. S. 371, and as we now claim it.

See Ice and Coal Co. v. Ice and Coal Co., 102 Mich. 235, 236.

It will be noticed that Justice McGrath held, that in the Clute case "*a correct result was reached*". By examining that case it will be seen, that on account of the *small extent* of territory in the inland lake, the erroneous rule resulted in an equitable *result;* a result not in conflict with the rule as now established.

It cannot be claimed that there was any *laches* or *consent* or *waiver* of rights on the part of the complainant, because a local agent at the mines followed the plain holding of the supreme court of Michigan until that holding was overruled, under the powerful argument of Justice Champlin, one of the judges who participated in the erroneous holding, who, confessing his part in the error, appealed to the court not to "*impart immortality to error*".

Now, is it possible, that it can be said in this case, under these circumstances, that a mining corporation having its stockholders scattered over the country; with its chief business office in Pittsburg, Pa., has lost real estate title after it had been in occupation and made large improvements upon it, spending over $5,000 in buildings, beside making about five acres of territory in the lake, because its local agent at the mine, Mr. Kidder, did not *resist* the law established by the decision of its highest court; and because he

moved *some* of the most valuable buildings over the line to avoid danger of losing them; the company still remaining in possession of the balance of the buildings on the disputed territory, which he had erected there. And is it possible, that this title has been lost to the complainant because Mr. Kidder, the local agent, did nothing to prevent defendants from asserting title to, or using the disputed property until after the supreme court of Michigan held its former decision in Clute vs. Fisher *erroneous*. It appears that within a reasonable time after learning of such decision, on the 29th day of October, 1896, Mr. Kidder served notice upon the defendants, that they were trespassing upon the rights of the complainant. (See page 99 of record.)

It was held by this court, in the language of Justice Field, that "The law of the state on many subjects is "found only in the decisions of the court, and is "equally operative as if embodied in a statute * * * "The decision of the highest court in the state makes the law which the citizen is compelled to follow until overruled." Baltimore & Ohio R. R. vs. Bogue, 149, U. S. 370, 397.

We submit that the complainant should forfeit no rights, by submitting to the law as established by the decision of the court, pending the overruling of such decision, and the change of the law by such action.

It appears that after the decision in Clute vs. Fisher, 65 Mich., and before overruled, the complainant and the defendants entered into a pumping contract, dated March 17, 1892, to pump out the water in this inland lake, to facilitate mining operations under the lake. That in fixing the amount that each should pay for pumping; the relative amount of territory supposed to be held by each at that time was considered, as well as other conditions, in arriving at the amount that each

should pay for pumping. The contract appears upon pages 88 to 95 of the Record.

From Mr. Kidder's testimony it appears, that he personally carried on the negotiations with Mr. Mills, the local agent of The Cleveland Iron Mining Co., and with Mr. Mather, who is the president of that company, in making the pumping contract. (See p. 88 of Record.)

It also appears from Mr. Kidder's testimony quoted above that when this pumping contract was made they acted upon the idea that complainant's premises stopped with the south line of section 10, and he so supposed, after he heard of the case of Clute v. Fisher, in 1887. But in making the pumping contract it was not considered a division of territory between the parties. It was simply a circumstance which affected the water question. The diorite division rock in the lake kept the water in on the south side.

Mr. Kidder testified as follows: Q. To express it in another way, you didn't at that time understand that you were interested in any property which might be found to exist north of that section line? A. No, we didn't at that time understand that we were interested in anything north of that line.

Q. And you contracted with reference to that fact? A. Yes, *well, that fact didn't govern; that fact wasn't thought of at that time and cut no figure.*

Q. *That wasn't thought of?* A. *The fact that we didn't own anything north of that section line. It had nothing to do with it.*

(See pp. 103 and 104 of the Record.)

Mr. Kidder stated that sometime before the making of the pumping contract of March 17, 1892, iron ore had been discovered by complainant on the south side of the lake, extending under the lake; that he and Capt.

Walters, mining superintendent of complainant, were informed as to such discovery; and long prior to that time it was known that ore was under the lake. Don. Bacon, a witness for the defendant, The Cleveland Iron Mining Co., and a former agent of that company, testified that he discovered the iron ore extending under the lake on the north side of the lake in 1887, and that The Cleveland Iron Mining Co. had been mining under the lake through shafts and drifts on the north side since then. (See p. 185 of Rec.) And Mr. Kidder testified that the diorite rock was a dividing line between the folds of ore under the lake and extending through in an easterly and westerly direction, through the central portion of the lake. (See p. 185 of Rec.) Notwithstanding this knowledge by all the parties to this suit of the great value of this property, and this knowledge for *many years before the making of this pumping contract*, it is claimed by the defendants that the pumping contract was *intended* to be a voluntary apportionment of the lake between complainant and defendants. Or, in other words, that The Lake Angeline Iron Company gave to the defendants thirty acres of the most valuable mining territory in the iron district—valuable all around the lake. All the parties desired to pump out the water that mining might be done there.

Such a position is unreasonable. Mr. Kidder thought that on account of the decision of Clute v. Fisher, 65 Mich. 48, his company was deprived of its rights under the lake, and to its center territory his company had claimed and occupied for many years; in making the pumping contract the idea of division of property rights was never thought of. He did all the negotiating with Mr. Mills and Mr. Mather, acting for the defendants, in making the pumping contract. It is upon the theory

that complainant had no real estate title to the center of the lake, and that its rights were voluntarily transferred, that the defendant, The Lake Superior Iron Company builds its claim.

Chief Justice Grant in delivering the opinion of the lower court, states the *claims* of the Lake Superior Iron Company as follows:

"1. There has been a practical division of the lake "bed between the parties. That contracts, explorations "and mining operations have been carried on, on the "strength of such division, for many years.

"2. That the pumping contract executed by the sev- "eral parties under their corporate seal, and expressly "providing that it shall be binding upon the successors "and assigns of the several parties making it a contract "that amounts to a division of the lake bed by *deed* "duly executed by the several parties.

"3. That the pumping contract is entirely *based* upon "the division of the lake bed above mentioned, and "said division forms so essential a part of the contract, "that if such division can be set aside or disregarded, "the contract itself must fall. That in such case not "only is the agreement to continue the draining of the "lake at an end, but either party has a right to de- "mand, that the drainage of the lake must stop and "the water allowed to arise to its original level, a re- "sult which after all that has been done under the "pumping contract and reliance upon it would work "great injustice to the defendants.

"4. That if the original division of the lake is disre- "garded and a new division must be made, such divi- "sion must be made by the middle line or the thread "of the lake, in accordance with the common law rule "for division of the bed of fresh water streams."

It thus appears that the claim of the defendant, The

Lake Superior Iron Co., to this disputed territory is based upon a *denial* of the complainant's rights acquired under its *patent* from the United States, and a claimed acquiescence in such position by the pumping contract, and that the complainant acquired no title north of the south line of section 10, but that the defendant, The Lake Superior Iron Co., did acquire the same through *its patent* from the government, and that by the pumping contract the complainant *recognized such to be the case.*

The complainant claims ownership of the disputed territory to the *center* of the lake under its patent. That it is the owner of that real estate by virtue of its patent, and the riparian rights appurtenant thereto; that it had a real estate title to the center of the lake, which could not be disposed of except by the action of the stockholders of the company. This fundamental issue is presented as to the claims of both defendants, the complainant acquired title originally from the United States government by virtue of its patent to the center of the lake, and of the disputed territory. All other claims are collateral to that claim. The court below held that the complainant acquired no title in fee to any portion of this territory, and that therefore this pumping contract made by the agents of the company could dispose of whatever inchoate or other right complainant might have without the action of the stockholders, because it had no real estate title.

Thus, as to The Lake Superior Iron Co., as well as The Cleveland Iron Mining Co., the federal question is the fundamental one, underlying the entire inquiry.

The Lake Superior Iron Co. asserts but three claims:

First—That the complainant acquired no title in fee from the government to the land in dispute.

Second—As it did not acquire such title in fee from the government, any right which it had, if any, was surrended by the pumping contract without the action of the stockholders.

Third—That if this title was not disposed of then the division of the lake should be made by a different rule than that invoked by the complainant.

This last point was not considered or passed upon by the lower court.

It is thus plain that if this court shall find that the complainant did acquire title to the center of the lake, then it being beyond controversy that the conrt below held, that complainant had no such title, then, the decree of the lower court cannot be cannot be sustained, even if the pumping contract was intended by the parties making it, that it be a conveyance.

Estoppel.

The Cleveland Iron Mining Company insists that if required to surrender possession of this property, *which it never owned*, the legal title to which is now in the complainant, it will suffer irreparable injury, such as a court of equity should recognize and *estopp;* and in its pleadings and arguments counsel insists that it owns the *legal title* to the land in fee and always has *under its patent;* and also insists that if it is not the owner of the legal title, it is entitled to the benefit of *estoppel* on account of irreparable injury; or, in other words, that it shall be given title to this property, which it does not own, and never has, on account of the *mutual mistake* of ownership.

The court below in sustaining the rights of the defendants, as we have pointed out above, held that the complainant was *estopped* by the pumping contract from asserting its rights to the territory in dispute, if it had any such right; also held that the complainant *had no real interest in the land;* and did not define what, if any right, it had.

Chief Justice Grant, in delivering the opinion of the court below, referring to this phase of the contract, uses the following language: "Complainant, however, "invoked the doctrine that title to lands cannot rest "on *estoppel* on account of the *Statute of Frauds;* and "that a vote of *three-fifths of the entire stock* of the "company is essential under the statute to convey "title. The obvious reply to the *first proposition is,* "that defendants also established that the Statute of "Frauds does *not apply to boundary lines;* and that the "doctrine of estoppel will be applied to the voluntary "adjustment of disputed *boundaries.*"

Now, was not this holding in the language quoted in effect that a title could *not* be transferred by estoppel on account of the Statute of Frauds; and on account of the requirement of a three-fifths vote of the entire stock of the company to authorize such conveyance? The learned judge seems to suggest, that the determination as to who is the owner of this disputed *territory between the south line of section 10 and the center of the lake,* as claimed by the complainant, and which involves the *entire* question of ownership of this disputed territory, acquired under *patents* from the United States government, *is simply the settlement of a boundary line between adjacent owners;* and *therefore,* holds that neither the doctrine of estoppel, or the Statute of Michigan *forbidding alienation* of property of a corporation without a three-fifths vote of all the

stock interested applies. This is nothing more than an erroneous interpretation of the *federal* question involved in this case; and the *fundamental* one, upon which all the adjudication rests. The fact that the learned justice calls the *determination of ownership of the disputed territory* consisting of about 30 acres, of triangular form, *involved in this controversy*, simply the settlement of boundary lines, does not make it so. Neither does it take away from the inquiry in this court *the fundamental federal question, which one owns the territory between the south line of section 10 and the center of the section* under their patents from the United States; a question to be disposed of in this court.

So it appears that so far from the Michigan supreme court sustaining the theory of *title* by *estoppel* in the defendant the Cleveland Iron Mining Company, it has recognized the accuracy of our intention, that if such title is involved, *title* to real estate under the law of of Michigan *cannot* be built *upon estoppel* or in violation of the statute *against alienation without a three-fifths vote of the stock*. But, as we have said it does, hold that it is *not involved*. Thus, presenting to this court the inquiry, whether it is involved in considering the ownership of the disputed territory *between* the south line of section 10 and the center of the lake; and whether that does not involve the federal question, viz: which company has acquired *title by virtue of the patent* rather than one of settlement or simply a boundary line; whether it involves a question of title to property surrounded by metes and bounds, a territory *entirely* acquired by virtue of United States patent as a riparian right adjacent to that property. Certainly the court below could not have held, or intended to hold, that title to

lands could be acquired *by estoppel in pais*, when the statute of the state of Michigan is directly to the contrary, as well as many decisions of that court; and when in the case of Hayes v. Livingston, 34 Mich. 387, in the language of Justice Cooley, that court held as follows: "The Statute of Frauds is express, that *no interest* in "lands, with certain exceptions which are unimportant "here, shall be created or *transferred otherwise than by* "*deed;* and although it is perfectly true, as is shown by "Mr. Bigelow in his treatise on the law of estoppel, "page 606, that where one by his conduct is precluded "in law from asserting his title in property, there is "strictly no transmission of title, yet this is a *mere* "*technicality;* the legal consequences are precisely the "*same*, and for all practical purposes the estoppel works "a conveyance. *It would hardly be creditable to the ad-* "*ministration of the law, if the application of a statute* "*so important as the Statute of Frauds, should be turned* "*away and defeated by a technicality so shadowy and* "*unsubstatial.*"

And in the case of DeMill v. Moffat, 49 Mich. 126, 132, Justice Graves, who delivered the opinion of the court, held as follows: "Again the application of estop- "pel which is contemplated would virtually operate *to* "*transfer* a part at least of the interest from the defend- "ant to the plaintiff, by matter in pais, in *contraven-* "*tion* of the rule *now settled* in the state by Hayes v. "Livingstone, 34 Mich. 384; Nims v. Sherman, 43 Mich. "45. There was no error in *rejecting the estoppel.*"

And in the case of White v. Hapman et al v. 43 Mich. 267, 269, Justice Cooley used the following language: "One certainly cannot be estopped from asserting a "title against a party who has always known of it and "always recognized it. Moreover, as was shown in "Hayes v. Livingston, 34 Mich. 384, *the title to land*

"*cannot pass by estoppel*, but if the plaintiff claims not "the title but the right to *permanent* possession, *this* "*comes to the same result.*"

And in the case of First National Bank of Kalamazoo v. McAllister, 46 Mich., 398, 406, this court, in the language of Justice Campbell, held: "*Title to land* "*cannot pass by a mere estoppel shown by parol.* Neither "can *an apparent title be assailed by the parol evidence* "*of one who has caused its transfer.* The presumption "in favor of one who holds the earliest unrecorded "title cannot be destroyed without proof of an earlier "right based upon superior equities."

In the case of Shaw v. Chambers. 48 Mich. 355, the court held, in the language of Justice Cooley, that "*A* "*mere equitable estoppel is not needed to aid a legal* "*title.* Proof of equities becomes important when the "*legal title is defective*, or where it is proposed to as- "sail it. One who *claims the legal title to land* under "a will has no reason for resorting to equity to restrain "an action of ejectment against him, except when the "common law is inadequate to give full relief. In- "junction may sometimes be sought to restrain a suit "at law, where the latter only involves a portion of "the controversy, or is likely to leave an apparent "record title, clouding the legal title in issue."

And the Michigan supreme court, in the case of John Hancock Etc. Ins. Co. v. Dick, 114 Mich. 340, 341, in the language of Justice Hooker, held "That "the courts may grant more complete relief where an "instrument is fraudulently obtained, by compelling "cancellation or surrender, and by rendering equitable "relief. As counsel suggests, there are cases which " to some extent at least, may seem to militate against "this theory, but they do not appear to have been so "considered by the court. Bay City Bridge Co. v.

"VanNetta, 36 Mich. 210; Shaw v. Chambers, 48 Mich. "358; Teff v. Stewart, 34 Mich. 1. Shaw v. Chambers "was an ejectment case, and the *only ground* of equit- "able jurisdiction was an alleged *estoppel in pais.* This "was disposed of on the *well settled rule in Michigan,* "*that titles to land cannot rest on estoppel in pais,* and "nothing remained but a legal defense."

So it is clear, that the supreme court of Michigan could have had no intention to sustain the theory of the answers, that title could be conveyed by estoppel in pais or that there could be a *perpetual restraint* from asserting title, which is the same thing. The holding was, as we have said, simply that the controversy was a case of *settlement of boundary lines.* But it is, in fact, the determination of the title between the complainant and the defendants of about thirty acres, and not simply the settlement of a boundary line; and the holding of Justice Grant *upon that point, was an erroneous disposition of the federal question involved.* Calling it whatever we see fit; it is *still* the *federal* question, which is the *fundamental issue* in this case—"*who owned this land?*" the complainant or the defendants, under their several titles acquired under the patents from the U. S. government?

VI.

What are the Equities of the Parties to this Suit?

1. The complainant, beyond any question, acquired the legal title to the property in dispute through the patent from the general government.

2. It held possession of the property, operated an iron mine close to the shore of this inland lake, contiguous to the property in question, developing the mineral value on the whole south shore. It commenced its mining operations and development in 1863. It erected blacksmith shop, carpenter shop and other buildings upon the territory in dispute, which were used in connection with the operation of its mines adjacent, as stated above, and, as appears upon the map, complainant's Exhibit "F". It asserted and maintained this ownership openly and notoriously, by this possession and development of the mine adjacent; determining its wealth by large expenditures of money.

3. The Cleveland Iron Mining Co., through Mr. Morse, the agent of that company, about 1885, asserted ownership to the south line of section 10 east of the north and south center line of 10, projected through the lake, because of the *description* in the Burnell *patent*, under which it claimed and asserted this, because that patent, as a part of its description, conveyed the *east half of section 10, and the west half of section 11*, though limiting the acreage to 555.15 acres, the acreage of the upland. This claim, we have shown, has no force whatever, but it was the assertion of an adverse right, by the Cleveland Iron Mining Co., and vigorously resisted by the complainant, through Mr. Kidder, as we have shown from his evidence, which is not contradicted; when he refused to advise his company to quit-claim that interest to the Cleveland Iron Mining Company, as requested by Mr. Morse, and vigorously asserted ownership of complainant under its patent. (See pp. 108 and 109 of Record.)

So this adverse claim has no force as a defense.

4. The Lake Superior Iron Co. has never occupied any portion of this disputed territory until within the last

few years, it has placed a diamond drill upon the property and done some diamond drilling searching for ore. The evidence shows just what those diamond drill holes cost, and the refunding of what they cost, with interest, would cover its actual loss when added to the extra amount of pumping expense paid by it under the erroneous apportionments of the amount of expense to be paid by each one of the companies for pumping out the lake. These extra expenses are easily arrived at from the evidence in the case, and from the accounts kept by Mr. Hall, and the accountant of The Cleveland Iron Mining Co. Mr. Hall was the general manager of The Lake Superior Iron Co. (See pp. 108, 109, 110 of Rec.)

The complainant offered in the court below, and offers in this court, as a condition of the decree in its favor, establishing the title in it to the territory in dispute claimed by the defendant, The Lake Superior Iron Co., to repay to it the diamond drill expense shown to have been expended by the Lake Superior Iron Company upon the property which it now claims adversely, together with the interest thereon; and also for the amount of all expense under pumping contract which it paid above its just proportion in the pumping referred to.

This would dispose of every possible equity that the Lake Superior Iron Co. can claim, if the title to the territory in dispute is legally in the complainant.

5. It conclusively appears here that on account of the erroneous decision of the supreme court of Michigan in Clute v. Fisher, that complainant was deprived of its property until that erroneous decision was overruled, at least Mr. Kidder was warranted in so considing it, and it was the cause of his acquiescing in the claims of defendants to the property in dispute, or

rather not resisting them. This acquiescence then, that is on the part of the local agent (there is no evidence of acquiescence by the stockholders or knowledge of the matter), was simply ceasing to assert title beyond its actual occupation. That the holding in Clute v. Fisher was erroneous is now beyond question, because overruled by the supreme court of Michigan. That this erroneous holding prevented the complainant from the lawful occupation and use of its property is also beyond question. That the decision of the highest tribunal of a state establishes the law as does a statute, is also clear from the decisions of this court quoted above.

Can complainant be held to have forfeited its title by failing to assert adverse rights, and failing to oppose occupation by either of the defendants prior to the overruling of Clute v. Fisher?

To say that complainant, or its officers, could have done different and be law-abiding citizens would be unjust; and to say that complainant forfeited any real estate title by the course taken by its local agent would be without precedent.

6. It is true that The Cleveland Iron Mining Co. has spent a large sum of money in driving drifts from its mine on the north side of the lake through the diorite division between the north fold and the south fold of ore under this lake into this disputed territory, and that it has mined a large amount of ore. It has done this, we believe, under the honest belief that it owned the property, and has done it without resistance on the part of the complainant since the decision of Clute v. Fisher, until the overruling of that decision by the Michigan supreme court.

Now, if irreparable injury would be the result in requiring the defendant, The Cleveland Iron Mining Co.,

to surrender possession of this property, injury that can not be redressed, there would then be an equity in favor of The Cleveland Iron Mining Co. But the evidence shows, and beyond contradiction, at the time the time the proofs were taken in this case, two years ago, that The Cleveland Iron Mining Co. had cleared a profit over $100,000, over and above all expenditures for drifts, mining work, machinery and the extra share of the pumping expenses on this land. A statement of this expense we will give below.

This appearing to be so, where is the irreparable injury? It is simply a matter of dollars and cents. If The Cleveland Iron Mining Co. has taken ore from the land of the complainant which it did not own, though honestly, and with the idea that it did own it, this gives it no equity in the land itself. The title would be as it was before. The damage would be to the party owning the land, the complainant, in having its valuable iron deposits depleted, and if, as we have said, The Cleveland Iron Mining Co. received and is allowed to retain the profits which it has made from the mining on this land before notice to it that Clute v. Fisher had been overruled, it will be paid for all its expenditures and a liberal profit besides, and it will not be the sufferer by a decree against it, as prayed for, because it is simply required to surrender possession of a property which it never owned, and is permitted to retain profits which it had made mining from the property of another.

7. We insist that since the notice by Mr. Kidder, in 1896, served upon The Cleveland Iron Mining Company, that it had no right to the land; it would be equitable for The Cleveland Iron Mining Company to account for all the ore that it has removed since that time, receiving an allowance for actual expenditures in the mining of the same.

Chief Justice Grant, in the court below, in delivering the opinion of the court, in stating what he understood to be the claims of The Cleveland Iron Mining Co., used the following language:

"The claim of The Cleveland Iron Mining Company "is thus stated:

"*First*—The patent under which the defendant, The "Cleveland Iron Mining Company, claims title, gave it "title to the whole east half of section 10 to the south "line thereof, and complainant is barred from objecting "to this claim because it was treated as a body of water "covering a portion of that territory as of *no value and "joined in the draining of the water as if the land were "merely swamp ground—valuable only when reclaimed "and made dry land.*"

(See....N. W. Rep., page 400. Record, p. 225.)

The complainant was operating an iron ore mine, and had been from 1863 to 1892, nearly thirty years, on the shore of this lake, and close to it, filling over 10 acres of territory in the lake from the debris that had been taken from its mine on the shore. The Cleveland Iron Mining Company had been mining on the northeast portion of this lake and on the shore and under the waters of the lake since 1887. The Lake Superior Iron Company were mining on the shore of the lake and under the lake directly north from the complainant's mine. To call pumping out this lake, which the evidence shows was about thirty feet deep in its deepest place, the *draining and reclaiming of swampy ground, and therefore of little value*, is a remarkable holding of fact under the evidence. It has no force.

It appears from this evidence, that this property had been known by both complainant and defendants for many years from their mining operations contiguous

thereto to be very valuable for mining iron ore. That the lake lay in one of the richest belts of the iron ore formation in the famous Lake Superior mineral region; and was surrounded by the largest mines in that region, and as shown by the evidence was then known to be very valuable.

VII.

COST OF MINING ON DISPUTED TERRITORY.

Profits therefrom to the Cleveland Iron Mining Company.

E. F. Bradt, mining engineer employed by complainant in the Lake Angeline Mine, testified, that from his examination of the workings of the Cleveland Iron Mining Company south of the "diorite division" and north of the south line of section 10, he estimated the amount of ore that the Cleveland Iron Mining Company took out from this disputed territory to be 120,000 tons. That would be up to his examination of the property in December, 1895, and the making of the maps furnished to him by Mr. Jopling, the mining engineer of the Cleveland Iron Mining Company, of the workings where the mining was done on the disputed territory, which map is complainant's Exhibit "H" (see p. 44 of Record), also offered by the defendant the Cleveland Iron Mining Company as its Exhibit 21.

Witness Bradt testified, that as engineer, he made a survey of the drifts and stopes in this disputed territory at that time, and estimated the quantity of ore

taken by the Cleveland Iron Mining Company. That he made his estimates from his own experience in mining. That he was acquainted with the cost of mining such ore in such an ore formation. That it was a part of his duty to examine into such things.

(See pp. 44, 45 of Record.)

The witness was asked the following questions:

Q. What would you say during the last three years on the average would be the cost of mining that ore and putting it into the skip and hoisting it to the surface per ton? A. Not including surface?

Q. Not referring to any outside expense of taxes or anything of that kind? A. Sixty cents a ton.

Q. Would that be a conservative estimate? A. I should consider it so. Aside from the expense of taking the ore to the surface there would be charged against the ore as a part of its cost when ready to be shipped from the mine its proportion of the expense of the mine, such as office force, agents, taxes and all other expenses connected with the mine, expense outside of the mining referred to under the estimate of sixty cents.

Q. Have you any way outside to state what would be the total cost, including the sixty cents, of the ore on the surface, covering all of those additional expenses you have referred to? A. About $1.10.

Q From your personal knowledge outside of the actual mining, which you say cost sixty cents, do you make your total estimate $1.10? A. Yes, sir.

(See p 45 of Record).

The same witness further testified, that the workings of the territory north of the south line of section 10, as shown on the map of January 22, 1896, Exhibit "H", is properly shown, so near as he could transfer it from one map to another. That he copied it from the map

that Mr. Jopling had given him. That he had nothing to do with selling ore; knew nothing about the selling price. That in driving the drifts after they got through the diorite division between the north and south ore formation, the ore taken out of the drifts would pay for driving them.

(See p. 45 of Record.)

So, it appears from this evidence, that except where the drifts were in rock, which would be the diorite drift of 640 feet (p. 42 of the Record), and the cross drift mentioned as 300 feet, the other drifts were paid for by the iron ore taken out from them, and the only cost of drifts that can be charged up against the profit on the mining would be the cost of driving the diorite drifts.

On cross-examination Mr. Bradt further testified as to complainant's Exhibit H, that the map was furnished to him by Mr. Jopling. That he did not examine its accuracy by actual measurements. That he did not compare Mr. Jopling's surveys with the map or make any measurements after receiving the map, to determine its accuracy; nothing more than by his observations while passing through the stopes and workings. That he did not compare this map with any other map previously made by himself. (See p. 55 of Record.)

He further stated that he obtained knowledge of the situation north of the south line of section 10, from visits through The Cleveland Iron Mining Co.'s workings since it opened up that work. That this work which he spoke of was all done in the years 1895 and 1896. That he made various visits there, but cannot give the dates; that he obtained his information as to the extent of the deposit on the north side of the section line from the visit that he made to the workings of The Cleveland Iron Mining Co., and from the inter-

change of maps between himself and the engineer of that company; that he has an opinion as to the life of the deposit of The Pittsburg and Lake Angeline Iron Co. south of the south line of section 10, and it is that there is a large quantity of ore there below the second level; that the quality of the ore on the north side of the line, where the defendent, (Cleveland Iron Mining Co.) is working the deposit, is of the same good quality of ore as the complainant has, close to the line on the south side; that the two deposits are of the same quality, and that he should say that the quantity was about the same on each side of the line, and that he cannot answer the question positively. (See pp. 56 and 57 of Record.)

Thus it appears that there were very large deposits of soft Bessemer ore of the very best quality, which have been cheaply mined, in the disputed territory north of the south line of section 10, as well as in the workings of The Pittsburg & Lake Angeline Company, south of the south line of section 10; and that a large quantity of this ore was mined each year by the Cleveland Iron Mining Company from the disputed territory; that the Cleveland Iron Mining Company was not only mining on its own territory, lot 2, Sec. 10, on the north side of the lake, but was also mining very large quantities of valuable ore from the disputed territory on the south side of the lake, and up to the south line of section 10, tramming the same out to the north of the lake through the diorite drift to its shaft on lot 2 north of the lake; and in the years 1895 and 1896 it took out of this disputed territory, according to the estimate of Mr. Bradt, at least 120,000 tons of this very valuable Bessemer ore, of fine grade.

On cross-examination the witness, Bradt further testified, that he took the length of the drift from the

Cleveland Iron Mining Co.'s map. That he did this within the last week or so. That he estimated the quantity of ore taken out from the maps and his general observation passing through stopes and rooms and looking about. That he had no instruments with him when doing so. That he determined the quality of ore by examining it. That he can judge quite accurately as regards the percentage of iron ore by looking at it; has had experience in that matter. That he looked at the ore in the workings in the stopes where they were mining. That the ore in a body is not always of the same quality. That his estimate of the quality of the ore was not based on the idea that everything was good, but estimated it for one grade only. (See p. 65 of Rec).

Witness was asked the following question:

Q. I want to ask you, Mr. Bradt, if it is not true that you *guess*, not only as to the quantity, but that you guess as to the several grades and quantities in each grade in the same general way? A. *No, sir; I do not guess.* I have described it to you by the use of maps and observation. I could estimate the quantity taken within the triangle when I know its limits. I could make an estimate from my knowledge of the workings and information I have from the maps. I don't call it a guess; a guess hasn't any information whatever to base it upon. (See pp. 65 and 66 of Record.)

On re-direct examination the witness Bradt further testified that the Pittsburg & Lake Angeline Iron Co. *began mining* on this south vein south of the south line of section 10 *in the spring of 1892.* That the Cleveland Iron Mining Co. drifted through the diorite formation to the north of the lake referred to, into the ore formation just north of the south section line of 10 so as to begin mining iron ore in the *fall of 1894.* That they did not mine any ore north of the south

line of section 10, and south of the diorite division line, *before the years 1894 or 1895.* That the *workings of the Pittsburg & Lake Angeline Iron Company* south of the south line of section 10, *showed very plainly from the dipping of the ore formation,* that the *same body of ore* was going north of the south line of 10 in its workings; and that information of this fact was *communicated* by Captain Walters or Mr. Kidder to Captain Mills, the agent of the Cleveland Iron Mining Company; and this is one of the ways that the company learned of the existence of this valuable deposit of ore. (See p. 66 of Record.)

Mr. Bradt further testified, that a man skilled in mining can tell what course the ore is taking; could discover it from the pitch of the formation, and whether it was pitching to the north side of the line. That this matter was talked over in the presence of Captain Mills before he put in diamond drill holes; and that he supposed the information Mills got from Captain Walters and other employes of the Lake Angeline Co. was what caused him to go in there and mine. That the character of the ore north of the line was just the same as south of the line; generally in a definite fixed ore body between the foot and hanging walls of the mine. Such ore is generally of the same character. There may be different qualities of ore, but this is the general rule within a reasonable limit of distance (see pp. 66 and 67 of Record.)

On re-direct examination commencing on page 57 of the Record the witness testified as follows:

Q. I am asking you in reference to what you saw while in defendant's mine; what were the indications from the openings of defendant's mine on the north side as to where the largest body of ore is? A. Well, so far as developed and opened up at present, it would

indicate that the larger body is on the south side of the line, from any information that has come to my mind.

That is my honest judgment from any information I have. I express a limit to my information, because I cannot see what drill holes might open up.

Q. Do mining engineers estimate from what they cannot see; have you done so? A. Yes, sir; my opinion is, that there is about the same quantity of ore on the north side as on the south side. I knew of the defendant company's putting some drill holes into this territory on the south line of section 10 under the water of the lake, in the fall of 1892: I knew the drill hole put in by the Cleveland company from its north side workings through its south deposit through the formation. As shown by its maps, I know where the drill hole stops.

This is the drill hole that was drilled from the north workings of the Cleveland Iron Mining Company through the diorite rock to its south workings on the disputed territory, as shown on complainant's Exhibit "F" and extends from the dotted line marked on Exhibit "F" "outline" of ore body, diorite foot wall, in a southwesterly direction to the south line of section 10; the total length of the drill hole being 970 feet, as shown by Exhibit F; 640 feet of which was driven through the diorite division rock, and the balance in the ore formation in the disputed territory (see p. 58 of Record).

I cannot tell you whether this was drilled through in 1890 or not. I have known of the drilling since it was done. After that time, the Cleveland Iron Mining Company put some more drill holes into the territory in the south side of the line between September, 1892, and the following months. They got permission

from the complainant company to go on south of the line. I don't know who they obtained the permission from. I know they had the permission. I obtained my information from Captain Mills. I suppose their purpose in drilling the holes from the south side of the line into the territory on the north side was to explore the territory. They found ore of good quality; I don't recollect how much. From the south side of the line, the Lake Angeline side, they drilled five holes. They started the holes in the Lake Angeline mine at the first level. I was there every day. I don't know whether Captain Mills kept track of it or not. I don't recall their reporting to us daily. Their object was to find ore of their own on the north side of the line. I know they found ore there. I do not recollect if it was found in all the holes. Some holes were sunk in this territory just north of the line, in addition to those holes run in from the Lake Angeline mine, and were sunk from the surface. I think there were five holes. Those holes were sunk perpendicular to reach this same deposit that the Cleveland company were after, I suppose (see pp. 57 and 58 of Record). Our company did not interfere with them in any way in their finding ore there. I suppose Mr. Kidder knew about their drilling these holes. I know that Mr. Kidder was present at the office of the Lake Angeline Company often. I know, as I have stated before, that what information I had was from Captain Mills, and that consent had been given to drill these holes. I do not know what the Cleveland Company did after finishing these holes. I know that they commenced to run a drift across from the north side to the south side of this 640 foot diorite rock. I did not include that in my estimate of the cost of the ore taken out; neither did I include in that estimate the cost of pumping

Lake Angeline. Lake Angeline was pumped out. I am not aware that our company take any part in pumping the lake, that is, in keeping it dry. I do not know what was the date when those surface drill holes were put down on the north side of the line, the perpendicular holes. My impression is that it was after the holes were run in from the south side in 1892. I should presume the following summer. My recollection would be the summer of 1893. The map shows five surface holes. Four of the drill holes sunk from the surface just north of the south line of section 10 by the Cleveland Iron Mining Company were put down in the Lake bed, or the ground which once was under the water of Lake Angeline. One is located near the railroad track as shown here; another near one of the drifts leading west; another apparently in the drift leading east: and another, the fourth, to the east of the workings, as shown on this map Exhibit 28. Three of these holders were within the territory that is indicated within those dotted lines running from the center and called "Pittsburgh & Lake Angeline Iron Company's territory," as marked by me upon map Exhibit F. These drill holes are all marked on our map (see page 58 of Record). The drill holes running from the Lake Angeline side of the line were drilled to the northwest, and I believe one to the northeast. The point from which those drill holes were started was under the bed of the lake on the south side of the line, and the direction they took was northwestward across the line into the bed of the lake—all of them but one, which I think was run northeast toward the upland. Possibly two were drilled to the north; all of the rest were run under the bed of the lake. These drill holes, three of them at least, run northwestward within the dotted lines within the disputed territory, as shown on map F.

(See pp. 50 and 59 inclusive of the Record).

Thus it appears, by the testimony of the witness Bradt, that the ore under the disputed territory is but the continuation of the ore deposit *discovered by the complainant in 1892*, in sinking its shaft south of the line and the driving of its drift at the bottom of the shaft to the north to the line; the Cleveland Iron Mining Company was allowed by Mr. Kidder and Captain Walters to go upon the complainant's property, and drill from the bottom of its shaft through the deposit of ore which they had discovered extended to the north over the line; this they did upon the supposition that the Cleveland Iron Mining Company was the owner of the territory north of the line, on account of the opinion in Clute v. Fisher, 65 Mich. 48. It is clear that the Cleveland Iron Mining Company *did not discover this deposit*, but that the discovery was made by the complainant. In fact, the mine was opened up under the lake by the drift driven from complainant's shaft, by its employes, to the south line of section 10, in the ore, and *before* Captain Mills of the Cleveland Company knew of it. It cannot be justly claimed by counsel for the Cleveland Iron Mining Company that it has any equities on account of the discovery of this large and valuable deposit, as it had nothing to do with its discovery; it was made by the employes of the complainant; and, by the evidence, it is beyond contradiction that The Cleveland Iron Mining Company, through complainant's shaft, drilled into this large deposit of the best quality of Bessemer ore, which was easily mined at slight expense; it has realized a very large profit over and above all expenditures from the mining done there, and it has no equities as against the complainant in this territory in dispute, beyond the value of the ore which it took out before notice that complainant claimed title.

The witness Bradt further testified:

Q. What was the purpose of your obtaining this map, Exhibit G, from Mr. Jopling? A. I accepted it as a gift from him. It is a common courtesy between us to exchange maps whenever it is convenient. I think that is my own dotting.

Q. Then this map, Exhibit G, is not in the same condition or state it was when received from Mr. Jopling? A. He evidently transferred from the map that I furnished him onto one common map, showing the workings of both mines, and this map was made from that; and I have no question or doubt but what it is correct as transferred.

Q. Then this map, Exhibit G, is composed from data of Mr. Jopling of the workings of the Cleveland Company's mine, and data furnished by you of the workings of the Lake Angeline Company's mine? A. Yes, sir.

Q. And it was compiled by consent of yourself and the willingness of Mr. Jopling, for the purpose of showing each other what the other was doing? A. Yes, sir; in December, 1895.

(See p. 61 of Rec.)

Exhibit G appears upon page 43 of the Record.

The witness further testified:

The map "220 Foot Sub Level" (appearing upon page 44 of the Record) was furnished to me by Mr. Jopling January 22d, 1896; that is the date of the map, showing a trespass over the line made by the Cleveland Iron Mining Company upon the Lake Angeline Company, on the territory south of the south line of section 10, made in 1895. I believe Mr. Jopling discovered the trespass in the fall of 1895, or the winter of 1895 and 1896, and reported it to me.

(See pp. 61 and 62 of Record.)

From this Exhibit, showing the drifts and workings of The Cleveland Iron Mining Company, north of the south line of 10, on the disputed territory, it will be seen, when comparing it with Exhibit G, page 42 of the Record, how rapidly The Cleveland Iron Mining Company prosecuted mining operations between the time of making Exhibit 'G' and defendant's Exhibit 21—the "220 Foot Sub-Level" map; and which points out that The Cleveland Iron Mining Company had mined out a large quantity of territory between the time of the making of the two maps. Mr. Bradt states that in the year 1895 and 1896 The Cleveland Iron Mining Company mined at least 120,000 tons of Bessemer ore (see p. 44 of Record.) And The Cleveland Company has continued this mining upon the disputed territory to this date, and with the same vigor; and it is fair to say, that at least 60,000 tons more were mined in 1897, and probably very much in excess of that, and each year thereafter; which fact will appear upon an accounting between the parties on a decree in favor of the complainant.

On re-direct examination, the witness Bradt testified:

The character of the ore north of the line was just the same as south of the line. Generally, in a fixed ore body, between foot and hanging walls, there is generally similarity as to the quality of the ore. There may be different qualities, but that is the general rule within a reasonable limit of distance. I saw the stock piles of ore, that was brought out of the workings by The Cleveland Company south of the dotted line from a distance.

Q. Now, taking these drill holes you speak of, five down in the mine there and five others from the surface, as drilled by The Cleveland Company, can you form an estimate of the cost of those drill holes from

the experience you have had in drilling such kind of holes in such places; that is the outside cost? A. I presume I could form an opinion. I am hardly prepared to do so without thinking it over; I will think it over and give you an estimate. (See pp. 66 and 67 of Record.)

The witness also testified:

So far as I am able to plat it from the maps of The Cleveland Iron Mining Company, this map Exhibit 'F' marks down correctly the length and location of the drill hole, through the quartzite belt in the south half of section 10, and is a line marked on the map, "drill hole 970 feet long." That is the length of the hole to the best of my knowledge. I have had experience and knowledge of the expense of such drilling through quartzite, and through ore such as has been described in the location where this hole was drilled.

Q. What do you say was the cost, at the time that was put in, per foot, drilling through the quartzite? A. I estimated that, covering all expense, at outside figure would be $2,910 to drill the entire hole through the diorite; it is not quartzite; that would be drilling from the north deposit of ore through to the south line of section 10, and would be on the course we have marked out on the map, and 150 feet below the surface. This drill hole was from the workings on the north side of the diorite; not from the bottom of their shaft of their workings. I don't know but their shaft may have been below that. It was from the ore body as it came up to the diorite rock through to the section line, as shown on their maps from the maps furnished by Mr. Jopling that I have referred to. I estimated the cost to be about the same as drilling through jasper.

Q. You speak of five holes from the surface as drill-

ed; can you give us—that is on the Cleveland Iron Mining Co? A. Five within that dotted line; within the jasper territory.

Q. South of the line marked 51 degrees north 49 minutes west (being the north boundary of disputed territory); there were three holes south of that dotted line? A. Yes, sir.

Q. What do you figure the expense of putting these holes down to be? A. About $2,112.

Q. What do you mean about the outside? A. The outside; I know the depth they have given. I have taken it from their map; the depth given upon the maps of the Cleveland Iron Mining Company.

Q. You speak of five drill holes from the workings of The Pittsburg and Lake Angeline south of the south line of section 10, through to the north, across this disputed territory, and over into the territory of the Cleveland Iron Mining Company, beyond the dotted line; will you state what would be the outside cost of those drilled holes? A. $3,438.

(See pp. 68 and 69, inclusive, of the Record.)

Witness further testified that after the discovery of this body of ore Captain Walters gave information to Captain Mills that the ore was sloping from The Pittsburg & Lake Angeline workings over under the lake north of the south line of section 10, and he showed these workings to Mr. Mills and his mining captains, Read and Tregambo, and that he was present at the time, and Captain Walters pointed out to them that the trend and pitch of the ore formation extended over and across the section line. (See pp. 69 and 70 of Record.)

Witness further stated that he surveyed the dividing line between the workings of the complainant and the Cleveland Iron Mining Company in the mine be-

low, which would be the south line of section 10, extended through the mine and its workings. That he did this with instruments, putting in pieces of timber and driving nails and spikes, for the purpose of locating this south line of section 10. That he did it by direction of his superior officers, either Mr. Kidder or Captain Walters; does not remember which one. That the workings of the two companies came together in one deposit. That the line between these workings was an imaginary one, and this he located by the driving of the nails. That the ore was of the same quality in the two deposits. (See pp. 71 and 72 of Rec.)

On re-cross examination the witness testified that he first went to the Lake Angeline mine as an employe of that company in 1889. (See p. 125 of Rec.)

He also testified as follows:

Q. In that place on the north side of this south line of section 10 reached by the diamond drill work, no one could tell with the diamond drilling that was done there whether there was any extent to the deposit on the north side of the south line of 10 or not, without subsequent opening up of the ground beneath by drifts and levels; isn't that true? A. Well, if you refer to the five drill holes drilled from the underground workings of the Lake Angeline, I should say it would not be necessary to drive the drifts, on account of the pure quality of ore that they obtained from it. (See p. 74 of Rec.)

Q. Is this the record of the five drill holes? A. Yes, sir; it shows remarkably good ore to the north; drilled northeast; drilled from the south side of the line to the north and northwest; and these records show the ore on the north side of the line * * *

Q. Will you call my attention to these two other

holes run northeast from your first level? A. Yes, sir; they were both in ore from there north of the section line; the hole was 427 feet, a trifle more * * * (See p. 75 of Rec.)

Q. Can you tell anything about the length of a vein of ore bored by a diamond drill without developing it? A. Not without several holes; not from this one hole; of course we don't know the length or height of it.

Q. can you tell the width of it in every place and its length by several drill holes? A. You often can.

Q. Have you, during any of your business in the location of drill holes? A. Yes, sir; quite a number of times.

(See p. 75 of Rec.)

The witness further testified, on re-direct examination:

Q. Speaking about these five holes showing the value of the quality of ore; does the ore body lie as a rule between rock walls, foot and hanging? A. As a rule, yes, sir.

Q. Was that the case with this formation we are talking about? A. Yes, sir.

Q. Then does the drilling at intervals—drilling at one point and then at another along the formation, or across the formation—determine the body of ore there, and quality and continuation of the quantity? A. Yes, sir.

(See p. 84 of Record.)

Alfred Kidder, the local agent of the complainant, testified as follows:

I have heard the testimony in regard to opening this south deposit just over the south line of section 10 upon the territory in dispute. * * * I understand that at the time, or before mining was done by The

Cleveland Iron Mining Company, Captain Walters had a talk with the officers of The Cleveland Iron Mining Company about the matter. I did not have a talk with Captain Mills. I think it was in 1889. I requested Captain Walters to tell Mr. Mills of some ore we had found, which we were pretty sure would lead on to that territory. We had a diamond drill hole about 30 or 40 feet south of the quarter post on the north and south center line of section 15, and it went down at a pretty high angle to the south; it went through very fine blue hematite ore, as I remember, and went through 30 or 40 feet of it, quite a little deposit of it; and from the nature, and from what we knew of the general formation there, we were very sure that it would go over the line (see p. 98 of Record).

I requested Captain Walters to see Mr. Mills and tell him about it; tell him that it would go to the north of the south line of section 10, and extended from the north and east; we knew it was lying pretty flat from the way we went into it; we could not tell which way the ore formation trended by the drill hole; we knew that anyway. We knew the formation was similar with it all along there; it was trending to the east, pitching to the north, as it is called. I did not have a conversation with Captain Mills after directing Captain Walters to inform him, as to whether he did so. We began our shaft after drilling the hole in 1889 and 1890, but it was not because of that drill hole; we didn't consider that it indicated anything very positive. That shaft which we sunk was done for the purpose of cross-cutting that valley there at a depth; we had been drilling for a long time *along the shore*, and we couldn't get down, we met ground so badly caved in so we couldn't get a hole down at it, and I finally told the captain I was willing to take the bull by the horns, as

it were, and sink a shaft down there and cross-cut, and then if we didn't find anything in that cross-cut, I felt so sure there was ore up that valley, we were willing to spend the money * * *

Q. I show you the point on this Exhibit F, south of the south line of section 10 marked "Shaft House"? A. That is it; that is the point on lot 3, section 15; that was called the 16th post on the line right on the shore of the lake. *We got as near the lake as we could. We started sinking the shaft in 1890, and we commenced driving the drift in the spring of 1891. We struck ore I think in the shaft about the first of May or thereabouts, May or June, 1891. We went through this ore, which proved to be the north side of the fold we had. This was only a few feet from the south line of section 10.* After putting that shaft down we put a drift across and cross-cut, and we struck the north side of a fold, and then drilled and struck out a distance of about 330 feet. I think it was the south side of the fold. That gave us the knowledge that *we had a regular fold of ore there*, which we believed to be continuous down as well as in length. Then we drifted to the west of the north rim of that fold *until we got up near the line. That indicated very strong probabilities that the ore would be continuous on over the line onto section 10; we felt very sure of it. I gave this information along in 1892. We had progressed far enough then to know that it would probably go over the line* (see pp. 98, 99 of Record).

I heard the testimony of Mr. Bradt, that Captain Mills was given permission by us to drill from the bottom of our workings, which I have described to the north. I remember that Captain Walters had a conversation, I think, with Mr. Mather underground, and he spoke to me about it, and I said I should be very glad indeed to have that done, and we were willing to

furnish the compressed air for the Cleveland Company, and we would keep an account of it. By that I meant the compressed air for them to use with their drill in this drift."

(See pp. 166 and 167 of Record.)

The witness further testified: "*I supposed at that time that the section line formed our north boundary*, and my *first* information that that was not so, was when I got Mr. Clark's opinion *in February, 1896*. I then gave *notice* to the defendants that they were *upon our territory*, the territory of the complainant. There was notice given to both of the defendants, I think it was *October 29th, 1896*. From statements of mining experts as to the quality of the ore that came out of The Cleveland Iron Mining Co. workings within the disputed territory, I have understood it was very rich; a high grade of Bessemer ore. I have an idea of what such ore is worth from experience; and what it cost to mine such ore. I think it should have been mined for 55 to 60 cents, and put it in the stock pile, charging up nothing for preparatory work, or general expense. I think The Cleveland Iron Mining Co. began the mining in this territory, south of this dotted line, some time in the spring of 1895.

Q. Now what expenses would there be, general expenses, above the 55 or 60 cents you have mentioned as cost per ton, that should be added to cover all other expenses in connection with the mining; what are those expenses? A. All of the things that go into the fixed cost; the salaries of the officers by the month, and taxes and repair account.

Q. Do you mean the men working in the mine? A. No, I mean the agent, superintendent and foreman and mining captain, and everybody who is generally

employed around a mine; head machinist and head blacksmith, and all those men; they make up the fixed cost.

Q. Taxes and things of that kind? A. Yes.

Q. What would you say that ore would cost in 1895, with those expenses added? A. I think $1.10 would be a reasonable estimate; an outside estimate.

The selling price of such a quality of ore in Cleveland at that time during that year; the average selling price, was $2.90 for ore of that grade.

The profit would be in the neighborhood of 60 cents. That year railroad freight was 32 cents a ton, and vessel freight about 75 cents, and probably ten cents for general expenses, including insurance and expense of the sale; that would be 63 cents profit at those figures. The selling price of that quality of ore in 1896 was $4 a ton, and expenses about the same as the year before, and the profit is the difference.

(See pp. 99 and 100 of Record).

Captain Thomas Walters testified:

That he was employed fourteen years ago as mining captain of the Pittsburg & Lake Angeline mine, and became mining superintendent eleven years ago, and as such, his duty was to lay out the mining work in the mine, under the general supervision of Mr. Kidder. (See pp. 115 and 116 of Record.) *We began sinking a shaft in the east end mine in 1890, near the 16th post on the south line of section 10, as located on the map made by our engineer.* This shaft was completed down to the first level *in March, 1891.* Before sinking the shaft we did diamond drilling; we reached the ore formation by drilling, that is, siliçious ore. From the drillings we formed the idea, that it was proper to sink the shaft. After doing this exploratory work and

sinking the shaft, I had a conversation with Mr. Mills, agent of the Cleveland Iron Mining Company after we struck the ore. I talked the matter over with him frequently; interchanged views. We struck the ore in May, 1891, with a cross-cut drift from the shaft at the first level. We drifted to the line and a few feet over the line. At that time I told Mr. Mills what I thought about the ore there. This was about in March or April, 1892.

(See pp. 116 and 117 of Record.)

Thus it appears, that the employes of the complainant sunk its shaft, and drove a cross-cut drift *to the south line of section 10, and over that line a few feet, discovering the ore* bodies north of the section line. After that Mr. Mills, the agent of The Cleveland Iron Mining Co. was *informed* by Captain Walters of the discovery of the ore. Walters said to Mills in substance, that he had ore on their property, referring to the territory north of the south line of section 10; supposing at that time it belonged to The Cleveland Iron Mining Company. He also informed Mills as to the indications of ore over the line. And about three or four months after, Mills applied to him for permission to drill from the bottom of their workings across to the north, over onto section 10. Captain Walters talked it over with Mr. Kidder, and they decided to give him permission, and his recollection is that he drilled five holes there. He saw them as they were drilled, and they found the continuation of the ore body there on section 10.

Captain Walters further stated, that some years before that, Mr. Mills drilled a hole from their old workings at the north, and that they had a good deal of conversation about that hole. That it was from the workings over north of the dividing diorite rock. That

Mills told him that they did not strike any ore. That they had found nothing but jasper passing through schist or diorite.

(See p. 117 or Record.)

He stated this hole is the one marked on complainant's Exhibit F as 970 feet long, through diorite, down to the south line of 10. That in his judgment, the drilling of this hole to the south line of section 10 cost on the average $3.00 a foot, which would be for the 970 feet, $2,910 (see page 118 of Record).

Witness further stated that as the complainant furnished the power to drill with, in driving the five holes from the bottom of their mine to the north, the drilling did not cost the Cleveland Iron Mining Company over one dollar a foot, as the substance through which they drilled was paint rock and ore, soft drilling.

He further stated that paint rock is frequently found in the ore, and is of a soft nature.

Witness further stated that he had been down the shaft of The Cleveland Iron Mining Company over to the north of the lake, and had passed through the drift, through the diorite. That he had been in the workings of The Cleveland Iron Mining Company north of the south line of section 10, on the south lay of ore, south of the diorite. That he has been there three or four different times. That the last time was in the spring of 1896. That from these three or four examinations he is able to state that there was from *forty to fifty thousand tons of ore taken out at that time from this south working.* This would be about January, 1896. That he wasn't here in March. That it was the last time that he was in those workings. That this ore was taken by The Cleveland Iron Mining Company from the south body through the shaft to

the north of the lake, and out of the shaft there. That the ore was of a high grade hematite (see page 118 and 119 of Record).

This witness testified that it would cost 35 cents for mining and securing the ground. Timbering the mine, 15 cents a ton; loading and tramming, 6 cents; making 56 cents in all. That there would be other expenses, such as the salary of the bosses and the captain; which would make the cost of the ore 60 cents a ton put into the skip for hoisting (see p. 119 of Record). That all other expenses, such as taxes and those not previously mentioned, would make the ore cost somewhere from $1 to $1.10 when loaded on the cars for shipment (see p. 119 of Record).

This witness further stated that The Cleveland Iron Mining Company could mine their ore just as cheap as the complainant, as there was no difference in their management, or in the character and quality of the ore. That the ore mined by The Cleveland Iron Mining Company was but a continuation of that mined by The Pittsburgh and Lake Angeline Company. That it would go 67 per cent in iron and .028 in phos., and the two ores from the two workings were just one thing, the same as the yolk of an egg; you couldn't tell the difference; there was simply a dividing line between them. That the freight on this ore from the mines to Marquette was 32 cents, and the boat rate from Marquette to Cleveland was 75 cents. That he could not say what was the insurance or commission for selling. That he did not know there was any commission.

He further stated that he did not know the selling price (see p. 120 of Record).

Witness further stated that from examining the workings of the Cleveland Iron Mining Company in

the deposit in question, he noticed that they were crowding the mining work there; and that they must have been working over 100 men the early part of 1896. That with double shift they would mine 500 tons in a day; that it was an easy ore to mine, and that The Cleveland Iron Mining Company prosecuted the mining with vigor since the time it opened up). That he understands this from his own observation (see pp. 120 and 121 of Record).

It will be noticed that 500 tons a day in twenty-six working days would make 13,000 tons a month, which would be 156,000 tons a year, if the work was prosecuted as vigorously during the winter months as the summer.

Mr. Bradt, the mining engineer, testified as quoted above, that from passing through the south workings of the Cleveland Iron Mining Company his judgment would be, that in 1895 and 1896, 120,000 tons of ore were mined. Thus it appears that his statement is very conservative indeed.

It also appears from Mr. Kidder's testimony, quoted above, as well as Captain Walters, and engineer Bradt, that 60 cents a ton was the cost of mining the ore and putting it in the skip; and that with all other expenses added, it would cost from $1.00 to $1.10. Hoisting and loading in the cars, and freight to Marquette, 32 cents; shipment from there to Cleveland, 75 cents.

By Mr. Kidder's testimony, insurance and commissions, 10 cents, which with all other expenses on surface, taxes, salaries, etc., total $2.27 cents. In 1895 the selling price of this quality of ore in Cleveland was $2.90, making a profit of *63 cents;* in 1896 the price was $4.00. From that substract $2,27, the above stated cost, and there remains for that year a *profit* of *$1.73 a ton*, or an *average* price for the two years on 120,000

tons at *$1.18 a ton, the profit would be $141,600, without* considering the profits for the year 1897. $200,000 is a small estimate of the total profits to 1898.

Mr. Mills, the agent and mining captain of The Cleveland Iron Mining Company, also testified on cross-examination as to the cost of mining in substance as follows:

"We began mining ore in 1895. We mined 40,000 tons that year. It was first class Bessemer ore; averaged from .030 to .035 in Phos. and 65 per cent in metallic iron—the very best of Bessemer ore."

That he estimated the cost of producing the ore that year which was largely from "opening up work and development work" at $1.25 a ton (see p. 190 of Record). Thus showing that there is only a difference of 15 cents between the estimated cost as made by the witnesses Kidder, Walters and Bradt, and that stated by Mr. Mills; Mr. Mills stating as explanatory of its costing that amount the first year that it was because it was in doing opening and developing work.

He further testified as follows: "Well, perhaps, I might explain, that the expense of mining the ore the first year was necessarily higher because of the expense of developing and opening a new deposit and developing things that had to be done."

Thus, he includes much of the expense of opening up a new deposit the first year in his estimated cost of $1.25 a ton for mining.

He further testified, that he left the mine in February, 1896, and had charge of this development only one year. That he had nothing to do with the selling of the ore or fixing the freights (see p. 190 of Record).

He further stated that the cost of driving the drift through the diorite division, which was the drift from the mining work on the north side of the lake, where

The Cleveland Iron Mining Company began mining under the lake in 1887, in the north fold of ore there through the diorite division between the north fold and the south fold of the ore, as testified to by Mr. Kidder, and he stated that the average cost in driving that drift was $15.00 a foot, which included driving the drift $8 a foot and other extra expense. This witness further stated, that the rails used in the drifts for tramming the ore were forty pound steel rails, costing $35 a ton (see p. 190 of Record).

It will thus be seen from Captain Mills' testimony, that he corroborates Kidder, Walters and Bradt as to the quality of the ore; and as to the cost of its production; except that he makes it a little higher; fifteen cents more, on account of the extra expense the first year in opening up the mine. Thus suggesting that the second year it could have been mined cheaper, which it probably was, after he left, as estimated by complainant's witnesses.

To arrive at the profit which The Cleveland Iron Mining Company realized, from mining the ore on this disputed property; if we take from the estimate of 63 cents profit as fixed by Kidder and the other witnesses of complainant, the fifteen cents which Capt. Mills added to the expense of mining, there would remain 48 cents profit, according to defendant's witnesses. Capt. Mills states that there were 40,000 tons mined the first year. This would be at the 48 cent profit on each ton; total, $18,200.

Now, it appears by the uncontradicted testimony, that when this profit, which we have just stated was realized, ore selling in 1895 for $2.90, the next year for $4.00; the expense of mining being the same; and the estimate of quantity of ore taken out in 1895 and 1896, as made by Capt. Walters and engineer Bradt, was

120,000 tons. As 40,000 tons were taken out in 1895, that would leave 80,000 taken out in 1896; and the profit per ton that year was $1.73 per ton when the ore was selling for the $4, according to Mr. Kidder's testimony, and no one contradicts it. So that the profit in 1896 was $138,400; total profit for the two years—1895 and 1895, $156,600. As to this estimated profit it will be noticed that it is arrived at from the testimony of the witnesses for The Cleveland Iron Mining Company, where there was any contradiction as to quantity or price; and from the witnesses of complainant as to amounts, where there is no contradiction; and where their testimony is all there is, as to such amounts and values. So there is no chance for contradiction in this argument as to the profits realized. It is therefore safe to say, that if the accounts as kept by The Cleveland Iron Mining Co. of the quantity of ore mined in this disputed territory during those years, and of the price realized therefrom, had been produced in court, it would have shown at least as large a profit as here estimated, and probably larger. We think this a fair deduction from the proof; from the failure of that company to produce its accounts of the work.

Having thus arrived at the profits realized by The Cleveland Iron Mining Co. for the years 1895 and 1896, in arriving at the equities of this case, we should inquire as to what was its expense for "dead work"—such as exploratory and other work, opening up this deposit.

First, then, as to the pumping contract:

It is claimed by the defendants that they paid a larger proportion of the pumping expense under the pumping contract under the apportionment of the amount to be paid in proportion to the supposed acreage of each. It can be found from the testimony of

the witness Bradt, that the acreage in dispute between complainant and The Cleveland Iron Mining Co. is 10.84 acres, as appears in complainant's Exhibit "F". It also appears from the proof and Exhibit "F", that the total acreage of the lake is 148.60. The Cleveland Iron Mining Co. have paid under that claim, one-fourteenth *more* of the entire cost of pumping expense than was its share—call it one-tenth more in order to make it ample. This was paid on the share of the disputed territory.

It appears from the statement of Mr. Youngbluth, the accountant of The Cleveland Iron Mining Company, given from its books, that the total expense under the pumping contract was $76,488. One-tenth of that is $7,648.80. This amount should be charged back to complainant on a decree and accounting in its favor. (See p. 220 of Record.)

The same witness testified that the total cost of equipping the south side deposit on the disputed territory was $25,000. This includes cars, tram track, drilling machines, and everything used in the mining of iron ore. The most of this equipment is portable and can be removed as personal property—not a fixture of the mine. But in making this accounting between expenditures and profits realized by the Cleveland Iron Mining Company on this disputed territory, we charge in the $25,000 against the profits, and also add the cost of driving the 640 feet of diorite drift from the mining work of The Cleveland Iron Mining Company on the north side of the lake, through to the iron ore in the south fold under the disputed territory. By the testimony of Captain Mills this cost $15 a foot, $9,600 (see p. 199 of Record). To these expenses add the cost of a lateral drill holes from the ore formation north of the diorite across to the south side of the dio-

rite into the ore in dispute 970 feet at $3 a foot (the price testified to by Captain Walters and Engineer Bradt and contradicted by no one), amounted to $2,910 (see p. 118 of Record). Also the cost of five drill holes from the surface, $2,112. Also drilling five other exploratory drill holes from the territory of the Pittsburg & Lake Angeline Iron Company as testified to by Engineer Bradt, $3,438. As to this last item, Captain Walters states that he having furnished the compressed air for doing this work, and as the rock was soft it would not cost over $1.00 a foot to drill it and this would reduce the cost to $2,000 (see p. 118 of Record). But allowing the higher estimate of $3,438, so as to give the outside price that could possibly be claimed, we have the total expense incurred by The Cleveland Iron Mining Company for preparatory work and every other expense, not already deducted in figuring the balance due for profits after allowing for the cost of actual mining, we have the following debit against these profits:

STATEMENT OF ACCOUNT.

Drilling holes from the mine of defendant Cleveland Iron Mining Co., north of the lake through the diorite into the ore in the disputed territory on Sec. 10, 970 feet, $3 a foot	$ 2,910.00
Driving drift through said diorite rock, connecting old workings of Cleveland Iron Mining Co., north of the lake with the disputed territory on the south side of the lake, 640 feet, at $15 a foot	9,600.00
Drilling 5 diamond drill holes from surface from the property of The Pittsburgh & Lake Angeline Iron Co., above stated	2,112.00
Drilling 5 lateral holes from the Lake An-	

geline property below ground, as stated above	3,438.00
10 per cent of total cost of pumping lake and all other expenses connected therewith, as stated above	7,648.83
Total cost of equipment of the south deposit according to statement of cashier of The Cleveland Iron Mining Company	25,000.00
	$50,708.83

Now, bringing forward the total profit for 1895 and 1896, as previously estimated	$156,600.00
Deduct above debit	50,708.83
Balance of profit over and above all expenditure	$105.891.17

It will be noticed that at least three-fourths of this $25,000 cost of equipment charged against the profits above consists of personal property removable to any other portion of this or the other mine of The Cleveland Iron Mining Company and can be readily removed to the mine on the north side of the lake belonging to The Cleveland Iron Mining Company through the drift in the diorite rock; and it should not be charged here against these profits, at least not over one-half of it, in arriving at the true equities of the matter. But allowing it to stand as one of the charges as above figured, we find a balance of over $100,000 clear profit, to The Cleveland Iron Mining Company in the two years 1895 and 1896 from the mining of this ore from the land of the complainant, mined without any title to the property or right to do so, but under a mutual mistake of the parties as to their rights.

Courts frequently balance equities in this way. An instance is found in the case of Allore v. Jewell, 94 U.

S. 506, 512. In that case, Allore, as heir of Miss Thibault, filed a bill to cancel a conveyance by her to Mr. Jewell, formerly postmaster general. The defendant Jewell had been in possession for about six years and he had placed improvements on the property to the value of about $7,000. On canceling contract, he would owe rent to the complainant, grantor's heir, for six years, and would have a claim against the grantor's heir to recover back the amount of consideration money paid to the grantor. That is to say, that the complainant had a claim for rent as well as for the surrender of the land. The defendant had a claim for the consideration money and the value of the improvements. There was nothing whatever in the pleadings upon the subject of terms of the decree. What did the court do? It simply balanced the rent for years, and consideration money against the value of the improvements, doing this with the consent of the complainant, and made decree upon this, lumping equities so to speak, without ordering any further hearing. There was nothing in the pleadings on the subject. There was nothing but the oral consent of the *complainant in open court to this course.*

It cannot be said, that the fixing of the terms upon granting the decree, is in any respect making a new contract between the parties for pumping. What was that agreement—not in any way an agreement to convey title or give possession, or anything else except for drainage? Now, the expense of drainage was apportioned to the three parties according to the land to be protected. This court finding that there was an error, in regard to the *area* of the land of the appellant to be protected; and finding that complainant owned an increased area as above indicated, is not making a new contract. The contract was simply for drainage

of the land, the expense to be apportioned as we have said—a mistake in the contract could be corrected by a change in the expense in proportion to the area of land owned by each. It does not in any way touch the matter of contract. The pumping is to be continued until the ore claimed by the complainant is *exhausted*. If it appears by the finding of the court that the ore of complainant extends to a larger area than supposed when contract was made, by reason of a *mistake* of all parties, then it is not a new contract, if the court determines by decree the rights of each.

Thus, in balancing equities of every name and character, a large profit will remain to The Cleveland Iron Mining Company by consent of the complainant, when consenting that the balance of ore taken out prior to the notice to defendants that they had no title to the property to be retained—a consent similar to that made in Allore v. Jewell, 95 U. S. 511, above referred to. In that case, Justice Field considering the question of balancing equities, used the following language: "The "*improvements made have not cost more than the amount* "*which a reasonable rent of the property would have* "*produced;* and the complainant, as we understand, "does not object to allowing the defendant credit for "them. And as to the small amount paid on the exe- "cution of the conveyance, it is sufficient to observe "that the complainant received from the administrator "of the deceased's estate only $113.42. There is no ev- "idence that he ever knew that this sum constituted a "portion of the money obtained from the defendant. "A decree must, therefore, be entered for cancellation "of the deed of the deceased, and a surrender of the "property to complainant, but *without an accounting* "*for back rents, the improvements being taken as an* "*equivalent for them.*"

VIII.

Equities of The Lake Superior Iron Company.

The Lake Superior Iron Company has received no income from the territory in dispute. That territory amounts to about 15 acres, as shown by the testimony of engineer Bradt (see p. 36 of Record), and as marked upon the map, complainant's Exhibit "F". (Page 40 of Record.) The total acreage in the lake belonging to The Lake Superior Iron Co., as shown by that map is 35.20 acres, and in dispute 14.92 acres. So that it has in the pumping apportionment about one-third more than its share; and this amount should be credited back, together with interest thereon.

It has paid $19,540.27, as shown by the statement of the account of Mr. Youngbluth, and also by the statement of Mr. C. H. Hall, General Manager of The Lake Superior Iron Co. One-third of that amount is $6,446.75. (See pp. 137-138 of Record.) The complainant should refund to The Lake Superior Iron Co. the cost of twelve drill holes which it sunk upon the disputed territory under the mistaken idea that it owned that land, and under the acquiescence of the complainant under the same mistaken idea. The cost of these drill holes amount to $4,794.08. (See pp. 141-142 of Record.) Interest should also be allowed upon this expenditure.

It appears from the evidence that for twenty-five years the complainant was in the actual occupation of this now disputed territory, by filling in about five acres north of the south line of section 10, and erecting valuable buildings and other appliances connected with its mine upon the shore of the lake, costing about

$5,000, as shown by the evidence of Mr. Kidder, quoted above.

On account of the erroneous decision of Clute v. Fisher, 65 Mich., Mr. Kidder moved two of the more valuable buildings over the line, to avoid danger of losing them under that decision. But continued in possession of this territory, with its other buildings, occupying the land up to the present time.

It appears from the testimony of Mr. Hall, the agent of that defendant, that no work was done upon this territory except drilling the holes. He testified as to the mining operations of his company on the north side and under the lake on their own territory; that they commenced pumping out the lake in 1893. That the expense of this pumping was substantially as stated by Mr. Youngbluth, the accountant of The Cleveland Iron Mining Co., to which we have referred. He also stated that his company drilled twenty-four holes, and within the limits of the bed of the lake. Twelve of them were inside of the dotted lines of the disputed territory. (See pp. 139-141 of Record.) He also testified as to what was found by the diamond drill holes.

The general manager of The Lake Superior Iron Company, C. H. Hall, examined by their counsel, Mr. Ball, testified as follows:

Q. Can you tell us in the first place about the expense of the opening of that body of ore altogether; the expense of sinking the shaft and running the drift and opening up the body of ore (the opening up of the body of ore owned by defendant on the north side of the lake)? A. I am not so sure; I can't separate this particular body of ore. From Nov. 1, 1895, to May 1, 1896, which dates back a little further than what time we stated, we commenced driving that drift.

The total expense up to January 1, 1897, has been $149,111.44.

Mr. Ball—Has that been principally in preparatory work for mining? A. That has been preparatory work in mining. It is not all in this deposit entirely.

Mr. Ball—Can you tell about the—approximately—expense of opening up that deposit ready for mining as you have it now? A. The greater portion, nine-tenths of these figures I give you have been expended there.

Q. Well, that would be sufficient. Does that include the drill holes that you made in exploratory work? A. It includes everything.

Q. Can you state the *cost* of these *drill holes* themselves that you have sunk on the land within the property *that is claimed by the Lake Angeline according to that mark?* A. *Yes, I can give the figures, I think. The total cost of diamond drilling exploration has been $8,784.99. I don't mean this is all inside of this pencil line.*

Court—Can you give each one separately, and they can be footed up then?

A. I can give them by numbers.

No. 1 cost	$481.27
No. 2	359.63
No. 3	506.61
No. 13	331.63
No. 15	335.80
No. 16	300.67
No. 18	311.66
No. 19	384.86
No. 20	373.41
No. 22	374.33
No. 23	333.72
No. 24	506.49

Q. Will you state whether these *holes* that were drilled over south of that imaginary line *within the territory claimed by the Pittsburgh & Lake Angeline Iron Co. exposed any considerable quantity of ore?* A. *They didn't in my opinion.* I have not the figures, except my memory; but one hole showed about 30 feet of ore in it. That is No. 13. No. 16 had about 20 or 25 feet. No. 15 had just a very small amount, I don't remember; it had simply ore. No. 3 had about 90 feet of ore vertical, good ore.

Q. Do you know whether or not prior to the time this suit was commenced the complainant or officers of the Pittsburgh & Lake Angeline Co. were aware of the discoveries of ore you had made there? A. *They were not aware of it at all,* and I heard the superintendent of the Pittsburgh & Lake Angeline mine say that he had a map showing the drill holes in the lake bottom. That was inside of a month (see pp. 141 and 142 of Record).

It thus appears, that in the sinking of a mining shaft on the north side of the lake, and work by The Lake Superior Iron Co. on its own territory north of the territory claimed by the Pittsburgh & Lake Angeline Co., they spent considerable money in opening up their mine under the north part of the lake. That they did this in the winter of 1895 and 1896, and following years. That in drilling over the line into the Pittsburgh & Lake Angeline territory they found some ore; but as Mr. Hall says in his testimony, in his opinion it didn't expose any considerable quantity of ore. As we have said above, it was well known for many years prior to that time that the deposits of ore upon the shores of the lake, both to the north and south, were dipping under the lake before these drill holes were put down, and that is why all three companies entered into an agreement to pump out the lake.

The clause in the pumping contract upon which the defennants rely for an estoppel appears upon pages 90 and 91 of the Record and is as follows: "To erect and "maintain proper and sufficient flume so constructed "above the present water level of Lake Angeline so as "to divert and carry away all surface water or other "surface drainage which would otherwise come into "the present bed of said lake from off the land lying "above the present water level of said lake and south "of the south line of section 10, as projected through "said lake; and also to run into said flume any and all "water which the said third party may pump from its "mine or mines, which said flume said third party agrees "to maintain and keep in good repair and in successful "operation, diverting such drainage from the bed of said "lake *until all the ore to which said third party is entitled* "(lying in and under the portion of the bed of said "lake lying south of the south line of section 10), *is* "*mined and exhausted, and then to turn over said flume* "*in good repair to said first and second parties hereto* "*without charge, and to allow them thereafter to operate* "*and maintain the same for the purpose of continuing* "*said drainage, giving the employes of said first and* "*second parties free access in and to said flume, for the* "*purpose of maintaining and operating the same,*" etc.

Without doubt there was an honest, mutual *mistake* between the parties as to the boundary line of ownership at the time the pumping contract was made; and if we put in brackets the mistaken clause of the above quoted portion of the contract, it would appear in the contract as follows: "which said flume said third par- "ty agrees to maintain and keep in repair and in suc- "cessful operation, diverting such drainage from the "bed of said lake until all iron ore to which third par- "ty is entitled is mined and exhausted, and then to

"turn over said flume in good repair to first and second "party hereto without charge", etc.

We submit that the controlling intent of this paragraph of the contract is, that the complainant shall maintain said flume *"until the iron ore to which said third party is entitled is mined and exhausted"*; whether the boundary be the south line of 10 or the center of the lake or any other point. That the words within the *brackets* are simply a statement thrown in as to *what was then understood* to be the boundary of ownership between the parties; but the paramount and controlling provision was that *so long as the complainant had ore belonging to it under the bed of said lake to be mined, and which had not been exhausted*, so long the complainant was to maintain that flume. We insist that the *erroneous* statement within the brackets above was a *mutual mistake, and is not a controlling clause that will affect that contract in any way as to its permanency if stricken out as a mistake. It forms no part of the consideration. It conveys nothing.* The paramount obligation of both parties to the contract is *to pump* the lake and *keep it pumped*, and to *maintain the flume* in condition for drainage *until the ore is exhausted*, leaving out the material clause in the brackets; simply prolonging the time in which the complainant must under its contract maintain the flume.

The defendants insist that they have a right to the disputed territory, because the words in the brackets above referred to appear in the pumping contract, and that the complainant is estopped from asserting its legal ownership; notwithstanding it is in conflict with the Statute of Frauds, and in conflict with the statute for the protection of stockholders. To maintain such a theory would not only be in violation of the Statutes of Michigan but unconscionable, because it would

maintain that a mutual *mistake* of ownership can be used to build up an equitable estoppel against the legal title *without fraud or irreparable injury.* And to assert that the legal title to valuable real estate can be taken away by mistake, *when the only party who has suffered by the mistake is the complainant.* This is beyond question, as the complainant offers to refund to the defendant The Lake Superior Iron Company, all its expenditures upon the disputed territory for work. It appears, as we have pointed out, that The Cleveland Iron Mining Company in the year 1895 and 1896, cleared over $100,000 over and above all expenditures on disputed territory, and that if compelled at that time to turn over the disputed territory to complainant; if allowed to retain the ore taken at that time, it would be a large gainer. There is no merit in the claim of either defendants. If the prayer of complainant is granted, they will simply deliver up what they *never owned*, and have no legal or equitable right to, The Cleveland Iron Mining Company having reaped a rich reward by the mistake, and the defendant The Lake Superior Iron Company will suffer nothing thereby when refunded the amount expended upon the territory with interest to date.

IX.

The Claim of The Cleveland Iron Mining Company.

Counsel for The Cleveland Iron Mining Company claim, that if the rule of apportionment to the center of the lake as invoked by complainant is adopted, it would be entitled to a small portion of the arm of the

lake lying south of the south line of section 10, on lot 3 of section 15; and that its right would extend to the center of this arm of the lake marked on complainant's Exhibit F, as 12.50 acres; its share as shown in its map amounting to somewhere in the neighborhood of an acre and a half to two acres as they claim it; and where the evidence shows the complainant has already mined to some extent. And this defendant insists, that it will be impossible to make a proper apportionment on that account, because of that mining.

There is no force in this position, for two reasons:

First—There was offered in evidence the maps of the under ground workings of The Pittsburgh & Lake Angeline Iron Company, at the request of defendant's counsel, showing the drifts and stopes in which ore was mined; the witness Bradt, the engineer in charge of the mining, testifying as to the number of levels and the size of the drifts, etc., from which an estimate of the amount of ore taken out could be made (see pp. .....of Record), or on an order for an accounting, more specific proof could be made by both parties as to ore mined.

Second—It fully appears that a much larger amount of ore was taken out by The Cleveland Iron Mining Company from the territory north of the lake owned by complainant, and one being offset as against the other, and the expense of one against the expense of the other, under the evidence, the loss would be much largely against the complainant, and in favor of The Cleveland Iron Mining Company.

So there is no force in that claim.

Chief Justice Grant, in delivering the opinion of the lower court, seemed to hold this an obstacle. At the bottom of page 256 of the Record, the learned judge, referring to that territory, said: "Complainant *has no*

"*means of ascertaining how much ore was taken from* "*this territory*, part of which, under its theory, belongs "to The Cleveland Iron Mining Company. Part of the "territory has caved in and the rest is filled with "waste rock."

As we have just said, the knowledge of the number of levels, accurate maps of the workings, sizes of the drifts, and the account of ore taken out of all such mining operations accurately kept from day to day, furnishes a very close information as to the amount. And upon this court determining, that the complainant is the owner of this property, and should be reinstated in its possession, according to a proper apportionment; the case can be referred to a master to take the testimony as to all such matters, to be reported to the court for final decree. Though, as we have said, The Cleveland Iron Mining Co. having taken so much larger quantity of ore from complainant's territory, and before it was notified that it had no right to mine there; and as the complainant is willing that it should retain the ore taken before said notice, viz: in 1895 and 1896 an offset against anything taken by it south of the line, if The Cleveland Iron Mining Co. should be entitled to any of that territory south of the line (of which there is doubt) there really would be no necessity for any such reference. But, if the court thought otherwise, it could be had.

Chief Justice Grant criticises somewhat our mode of partitioning (see page 257 of the Record). All we would say as those criticisms is that there is, as suggested by the learned judge, a difficulty in apportioning any inland lake of irregular form; but they are apportioned according to the conditions which each present, as he holds in his opinion, and that if the method which we suggest in our bill of complaint

and maps are not in exact accord with what this court thinks should be the mode of partitioning, of course it is the province of the court to apportion as in its best judgment would be most accurate and equitable.

On page 259 of the Record referring to the opinion of the court below, it is said that "The result of com-"plainant's contention would be that whenever any "case has been *overruled*, every principle or agreement "based upon that decision may be set aside by the "courts, if not barred by the Statute of Limitations. "The agreements and settlements of parties made with "full knowledge of the facts in reliance upon the law, "should be as binding as the judgment of the court in "a particular case. If ten other similar suits had "been pending when Clute v. Fisher was decided, and "judgment had been rendered in reliance upon that "decision, the courts could not now set them aside."

Our claim is, that on account of the decision of Clute v. Fisher, the complainant was not guilty of acquiescence because not insisting upon its ownership of the land in dispute, as it had done for twenty years; and when that opinion was overruled, the complainant having been compelled by the law as established in that case not to resist the defendants in their assertions of ownership. Supposing that to be so, when that case was overruled the complainant, whether mistaken or not, should be placed just where it was when Clute v. Fisher was decided on its application as to its title and equitable rights, at least voluntary acquiescence in such possession should not be imputed to it. It would be unjust to say that Mr. Kidder or the complainant should have known more about the law than the supreme court itself, and that complainant was guilty of acquiescence and surrender of rights under those circumstances. Such a position would shock

the sense of justice of any fair minded man. Clute v. Fisher explains fully why during the years 1887 up to 1896 Mr. Kidder made no resistance until after he heard of the decision of Ice and Coal Co. v. Ice and Coal Co., 102 Mich., overruling the former decision; and why, in making the pumping contract, he did unite with the defendants in arriving at the amount to be paid for pumping under the supposition that the territory north of the south line of 10 had been lost by the complainant, under the decision of Clute v. Fisher, 65 Mich. It simply explains his action in the matter that he was acting in good faith, intending to obey the law and keep the peace, and that is all that is necessary in this case. He says that in making the contract for pumping the lake, there was no thought or suggestion on his part of fixing any boundary or title to land, as he at that time supposed that his company was foreclosed of their rights by Clute v. Fisher.

We submit there is no force in the claim of complainant, that the court must treat the pumping contract as an intentional division of the territory and an apportionment of the same; and that the court cannot *reform* this contract, as to the *amount* to be paid for this pumping, notwithstanding the clear *mistake* of all parties as to the legal title to the territory covered and as to the amount each should pay for pumping. That the lake must be left to fill up, if any of the parties refuse to allow a reformation of the contract, is absurd. It is one of the plainest duties of a court of equity, not to make contracts, but to reform them, according to the rights and intentions of the parties. This can clearly be done in this case, as to this pumping contract.

As we have said above, the controlling intent of the parties, as shown in the paragraph of the pumping

contract relied upon by defendants (page 90 of Record), is that the complainant shall maintain a flume *until* the iron ore to which said third party (the complainant) *is entitled, is exhausted;* and that the statement within the brackets, viz.: "lying on, in or under the "portion of the bed of said lake lying south of said "south line of section 10", is simply a statement thrown into the contract as to *what was then understood to be the boundary of ownership* between the parties; but the *paramount* and *controlling provision* of the contract is, *that so long as the complainant has ore belonging to it,* under the bed of said lake, *to be mined,* and which has *not been exhausted, so long the complainant must maintain that flume;* and that *when* its ore becomes *exhausted,* then that it *shall permit the defendants* to *maintain the flume upon its territory so long as they shall desire.* We submit that there is no force in the claim of defendant's counsel, either that the pumping contract is in any sense a conveyance of rights, or that it cannot, if reformed, protect the rights of all.

X.

Estoppel not Applicable to this Case.

"The doctrine of estoppel can have no application "where everything was equally known to both parties, "or the party sought to be estopped was ignorant of "the fact, out of which his right springs."

Fletcher v. Holmes, 25 Ind. 458.
Long v. Anderson, 62 Mich. 537.
M. & H. Turnpike Co. v. Sidener, 40 Ind. 424.
Anderson v. Hubbel, 93 Ind. 578.

"The answers do not allege that the defendants were "ignorant of the facts upon which they seek to build "an equitable estoppel. And in order to assert such "claim and make such proof there must be pleading "alleging such claim."

Bigelow on Estoppel, 5th Ed. 709.
Lash v. Randall, 72 Ind. 480.
Robbins v. McGee, 76 Ind. 390.
Wood v. Ostram, 29 Ind. 177.
Terrill v. Grinnell, 20 Iowa 393.

Bigelow on Estoppel, 5th Edition, 709, states the rule as follows: "A plea of estoppel *in pais* by misrepresentation should ordinarily show:

"First—That the party sought to be estopped, has made a representation with the intention of influencing the conduct of the pleader in a manner inconsistent with the claim set up.

"Second—That the misrepresentation was known by the party making it to be false, and that the pleader did not know that it was false, but on the contrary believed it to be true.

"Third—That the pleader has acted upon such act or declaration.

"Fourth—That he will be prejudiced by allowing the truth of the admission to be disproved."

In the case of Pickard v. Sears, 6 Adolph & Ellis, 259, Lord Denman stated the rule as follows: "The rule of law is clear, that where one by his words or conduct *wilfully causes another to believe the existence of a certain state of things, and induces him to act on that behalf, so as to alter his own previous position*, the former is concluded from averring against the latter a different state of things, as existing at the same time."

This has been a leading case as to equitable estoppel and points out *that the party asserting the estoppel must*

have been induced by the party against whom the estoppel is sought, with wilful intent to defraud, to act *different* from what he otherwise would have done. No such wilful intent exists in this case. In fact all of the parties acted under mutual *mistake, each having knowledge of the facts.*

In the case of Brewer v. Boston & Worcester R. R. Corp., 5 Metcf. 478, the court held as follows: "A and B, owners of *adjoining land,* intending to establish the divisional line, according to the true boundary, *agreed by parol,* on a line that did not conform to such boundary; and afterwards held possession according to such conventional line. B sold his land to C. Before the sale A stated to C that the land which he (A) claimed was bounded by said conventional line between himself and B, and *that he did not claim beyond that line.* After the sale to C *he made improvements* on the land next to such conventional line, *with the knowledge of A,* who was often present, and pointed out said line *without expressing any dissent to C's* proceedings, or giving notice that he had any claim to said land; and afterwards A discovered that said conventional line was not the true dividing line, and that C was in possession, as B had been, of a piece of land, which according to the true line belonged to A; and he therefore brought a writ of entry against C, to recover between the true line and said conventional line. Held, that A *was not estopped to claim this land of C as he had acted under a mere mistake, without fraud or gross negligence.*"

The learned judge, discussing the case, used the following language: "It is also agreed that the parties to the said parol agreement acted under *the belief* that their respective flats were in the direction and in conformity to the line agreed upon. We must, therefore,

consider the declarations and admissions as having been *made in good faith and by mere mistake;* and admissions thus made do not, we think, by law operate by way of an estoppel. This kind of estoppel was first established by courts of equity, and has since, to a certain extent, been adopted by courts of law. *It is founded on fraud or gross negligence amounting to fraud.* First Story on Eq. 386, 391. The doctrine, we think, is correctly laid down by Nelson, Judge, in Welland Canal v. Hathway, 8 Wend. 483. "As a general rule", he says, "A party will be precluded from denying his own acts or admissions, *which were expressly designed to influence the conduct of another, and did so influence it;* and when such denial will operate to the injury of the latter, and where in good conscience and honest dealing he ought not to be permitted to gainsay them. The same doctrine substantially is laid down in Pickard v. Sears, 6 Adolph & Ellis, 474."

In the same case the learned judge used the following language: "We do not, however, decide the case on these considerations, but on the ground that the demandant has acted fairly under a mistake, and that he has made no declaration contrary to his honest belief at the time or with any intention to deceive the tenants, and we think it clear the declarations thus made do not operate in the nature of an estoppel. A party is *not estopped to prove a legal title to his estate by any misrepresentation of its locality made by mistake, without fraud or intentional deception, although another party may be induced thereby to purchase an adjoining lot,* the title to which may prove defective. For, he may require a warranty, and *it would be most unjust that a party should forfeit his estate by a mere mistake.*"

In the case of Tolman v. Sparhawk, et al, 5 Metcf. 476, the court held as follows: "That a parol agree-

ment *not in writing* is valid so as to pass title to land *cannot be maintained under any circumstance.* It may justify the occupation of lands by the respective parties in pursuance of the agreement; and by such an occupation under a claim of right, if long enough continued, a legal title may be acquired (by the expiration of the Statute of Limitations); and such an agreement and occupation under it, though not continued twenty years, may, perhaps, under certain circumstances, operate as an estoppel, according to some of the decisions in the New York cases. Under what circumstances such an agreement would be held to operate in that state, by way of estoppel, seems to be left doubtful by the decisions of the court of appeals in Adams v. Rockwell, 16 Wend. 285. But however this may be, we are well satisfied that on principles of law, established, it *cannot so operate where the agreement to establish an erroneous line is founded on a mistake*, the parties supposing the line agreed upon to be the true boundary; nor, unless the occupants shall have made improvements upon the premises between the true and erroneous lines, *exceeding in value the value of the land without such improvements; nor, even then, if the occupant making the improvements may be entitled to recover from the owner of the land the value of the improvements.* To hold that under such circumstances a party might be *prevented from asserting* his title to his land by the doctrine of estoppel, would be an *invasion of the statute of frauds and against manifest justice.*"

So, in the case at bar, to deprive the complainant of its legal title to a large and valuable iron ore deposit and iron ore territory, in area about thirty acres, *by way of estoppel*, when complainant offers to refund to The Lake Superior Iron Company any expense incurred

in diamond drilling, or any other expense incurred; and when it conclusively appears that the defendant The Cleveland Iron Mining Company, has reaped a profit in excess of all its expenditures from the removal of ore from the property, amounting to about $100,000, over and above such expenditures, very much exceeding any amount taken by complainant from a small territory referred to that might possibly have belonged to The Cleveland Iron Mining Company under the rule of partition invoked by complainant: and when complainant says to that defendant, you can retain these large profits up to the time that you were notified that you were upon our property, up to the time that this *mutual mistake was discovered.* Under such a condition there was no fraud or deceit or inducement by complainant — nothing on which to build an estoppel; when the court determines, that the legal title is and always has been in complainant, or there has been no fraud of any kind on the part of complainant in the matter, and that what the defendants have done upon the land has been acquiesced in by complainant through mutual *mistake*, under which defendants have reaped a profit and no loss, (that is, The Cleveland Iron Mining Company) and the defendant The Lake Superior Iron Company, is offered a return of all expenditure: there is neither legal or equitable reason why the defendant should be *allowed to retain real estate to which they have no title.*

In the case of Proctor v. Putnam Machine Co., 138 Mass. 159, 162, the Massachusetts court affirmed its long line of former decisions in regard to equitable estoppel, and held as follows: "Neither lands nor any interest therein, are to be conveyed by mere oral agreements, and the declaration or admissions of a demandant, made in good faith, and *by mere mistake, cannot*

estop him from proving the legal title to his estate, even if, but for such admissions or declarations, the tenant might not have incurred the expenditures which he has made. Tolman v. Sparhawk, 5 Metcf. 469. Brewer v. Boston & Worcester R. R. 5 Metc. 478. Liverpool Wharf v. Prescott, 7 Allen 494."

This court held in the case of Brandt v. Virginia Coal and Iron Co., 3 Otto 326, 337, in the language of Justice Field, as follows: "It is difficult to see where "the doctrine of equitable estoppel comes in here. For "the application of that doctrine, there must generally "*be some intended deception* in the conduct or declara- "tions of the party to be estopped, or such gross negli- "gence on his part as to amount to constructive fraud, "by which another has been misled to his injury. '*In "all this class of cases*,' says Story, 'the doctrine pro- "ceeds upon the *ground* of constructive *fraud* or *gross "negligence*, which in effect implies fraud; and there- "fore, when the circumstances of the case repel any "such inference, although there may be some degree "of negligence, yet courts of equity will not grant re- "lief. It has been accordingly laid down by a very "learned judge, that the cases on this subject go to "this result only, and that there *must be positive fraud "or concealment, or negligence so gross as to amount to "constructive fraud*.' First Story's Eq. 391. To the "same purport is the language of the adjudged cases. "Thus it is said in the supreme court of Pennsylvania "that the primary ground of the doctrine is, that it "would be a fraud in a party to assert what his pre- "vious conduct had denied, when on the faith of that "denial, others have acted. *The element of fraud is "essential*, either in the intention of the party estop- "ped, or in the effect of the evidence which he at- "tempts to set up."

Hill v. Epley, 31 Pa. St. 334.
Henshaw v. Bissell, 18 Wall. 271.
Biddle v. Boggs Mining Co., 14 Calif. 368.
Davis v. Davis. 26 Calif. 23.
Com. v. Moltz, 10 Peters 331.
Copeland v. Copeland, 28 Me. 538.
Delaplaine v. Hitchcock, 6 Hill. 616.
Hawes v. Merchant, 1st Curt. C. C. 136.
Zuchtman v. Roberts, 109 Mass. 53.

In the case of Steel et al. v. St. Louis Smelting and Refining Co., 106 U. S. (book 27 co. op. ed. p. 226) Justice Field, delivering the opinion of the court, held: "The principle that one should be estopped from as- "serting a right to property upon which he has by his "conduct misled another, who supposed himself to be "the owner, to make expenditures, *cannot be invoked* "*by one who, at the time the improvements were made, was* "*acquainted with the true character of his own title, or* "*with the fact that he had none.*"

Citing, Brandt v. Virginia Coal & Iron Co. 93 U. S. 327.
Henshaw v. Bissell, 18 Wall 271.

In the case of Henshaw v. Bissell, 18 Wall. 271, 272, the court held as follows: "Both claimant and surveyor seemed to have acted on the supposition, that the erroneously designated parallels of latitude should govern the location, instead of the natural boundaries indicated on the map. There does not appear to have been any intention, on the part of Larkin, to mislead anyone as to the nature of his rights. He was satisfied to keep the land originally selected by him; and he contended, and those who succeeded to his interests contended, for the correctness of his selection; but the government, through its appropriate officers, interfered, and asserted that another and different location was required by the grant. There is, there-

fore, *no case for the application of the doctrine of equitable estoppel. For its application there must be some intended deception, in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud.* An estoppel *in pais* is sometimes said to be a *moral* question. Certain it is, that to the enforcement of an estoppel of this character *such* as *will prevent a party from asserting his legal rights to property*, there must generally be some degree of turpitude in his conduct, which has misled others to their injury. Conduct or declarations founded upon ignorance of one's rights, have no such ingredient, and seldom work any such result." Citing

Brewer v. R. R. Co., 5 Metcf. 479.
Boggs v. Mercier Mining Co., 14 Calif. 368.
Whitaker v. Williams, 20 Conn. 105.

In the case of Kingman v. Graham et al., 51 Wis. 245, the court used the following language: "It must be remembered that the defendant undertakes to estop the plaintiff setting up a title to real estate by matter in pais, which title appeared of record, in the office of the register of deeds of the proper county, at the time the matter in pais which is set up as an estoppel occurred, and had been so upon record for two years previous thereto.

In Brandt v. Virginia Coal & Iron Co., 93 U. S. 326, the supreme court of the United States used the following language: Here the court quotes the language of Justice Field quite at length, which we have quoted above, and continues: "This court has adopted the foregoing rule as to estoppel in pais substantially in Norton v. Kearney, 10 Wis. 443-445; Vilas v. Mason, 25 Wis. 323; McLean v. Dow, 42 Wis. 610. Under this rule, we do not find any evidence in the record which brings the plaintiff within it. He took all proper pre-

cautions to give notice of his title to all the world, by putting his title upon record in the proper office * * * It is also essential for its application, that the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the true state of the title, but also of any convenient or available means of acquiring such knowledge. When the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." Citing

Knouff v. Thompson, 16 Pa. St., 357, 364.
Crest v. Jack, 3 Watt, 240.
Hepburn v. McDowell, 17 S. & R. 383.
Markham v. O'Connor, 52 Ga. 183.

In the case of Brothers et al v. The Bank of Kaukauna, 84 Wis. 381, 397, the court held as follows: "In order that such an estoppel shall exist, there must generally be some intended deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to positive fraud, by which another has been misled to his injury."

Citing cases referred to above.

And in the case of Betman v. Harness, 26 S. E. Rep. 272, 277, the court held as follows: "It is of the essence of estoppel by conduct where one alleges that the conduct of another has misled and betrayed him, that the former should be inspiring false belief and confidence in that other, and it cannot, where that other's eyes are open to the true state of things, and he knows the truth about the things as to which he alleges he was misled, and knows the other man did not intend to inspire false confidence." Citing

Bigelow on Estoppel, 262.

Bates v. Swagger, 40 W. Va. 420; 21 S. E. Rep. 874.
Mason v. Bridge Co., 28 W. Va. 639, 649.
Graham v. Thompson (Ark.) 18 S. W. Rep. 58.

From a review of the authorities cited, we think it clear that the evidence presents no ground for the application of estoppel to defeat the legal title of complainant. There was no fraud upon the part of complainant in the case. Its entire action was *against its own interest* and controlled, as conclusively appears, by the decision of Clute v. Fisher, 65 Mich. 48. Whether the complainant should have submitted to the law as laid down in Clute v. Fisher, without resistance and litigation, is a question of judgment and policy whether it should have done or not. But it conclusively shows an honest purpose to keep the law as there stated. Subsequently the law as laid down in Clute v. Fisher was overruled in Ice & Coal Co. v. Ice & Coal Co., 102 Mich. Clute v. Fisher was the cause of the complainant's temporary non-resistance of the claim of defendants to the land in question and making the pumping contract, in which the supposed relative ownership of the surface, determined the *amount* that each should pay for pumping the lake, and the establishment of a permanent drainage by the erection of a flume for the discharge of the water. This flume run the full length of the lake on the south and was built by the complainant at a cost of $6,000 and by the contract to be maintained by it as long as it had ore to be mined there. Also granting to the defendants the right to use and maintain the flume so long as they should have ore to mine within the territory in question (see pp. 90 and 91 of Record).

We submit that it is clear from the review of this case,

First. That the complainant acquired, through the patent from the government, the legal title to the property in question, and now owns the same.

Second—That under the pleadings and proofs and opinion of the supreme court of Michigan, a federal question is involved, and is the basis of all determinations by that court.

Third—That there can be no estoppel by contract in this case depriving complainant, a mining corporation, of a portion of its mining territory without authority of three-fifths in interest of the entire stock of the company granted at a stockholders' meeting called for that purpose.

Fourth—Under the statutes and decisions of Michigan, title to realty cannot be transferred by estoppel *in pais;* the question involved is not the settling of a boundary line, but one of transfer of title of about thirty acres of mining territory, of triangular form derived through patent from the United States government.

Fifth—That the holding of the disputed territory by the defendants since 1895, when Cleveland Iron Mining Co. commenced work on it, has been by mutual *mistake* of rights, without fraud on the part of any of the parties.

Sixth—That the defendant, The Cleveland Iron Mining Co., by surrendering the property to complainant will suffer no loss; but reap a rich harvest from the mutual *mistakes*, if allowed to retain the iron ore mined by it upon the property in question prior to October 29, 1896, when notified by complainant that it was trespassing upon its rights.

Seventh—That the defendant, The Lake Superior Iron Co., will suffer no loss if it is repaid by complainant the amount it expended in diamond drill explora-

tions upon the property in dispute, and interest and all other expenses in connection therewith, which the complainant here offers to repay; and that the decree in its favor be conditioned upon doing so.

We respectfully submit that this court should partition the lake territory between the defendants and the complainant in the manner asked for or in such other way as shall appear to the court most in accordance with law and equity.

Respectfully submitted,

F. O. CLARK,
Solicitor for Complainant.

ALFRED RUSSELL,
Of Counsel.

No. 260.

Brf. of Russell for P. C.

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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 260.

THE PITTSBURGH & LAKE ANGELINE IRON CO.,
Plaintiff in Error,

vs.

THE CLEVELAND IRON MINING CO. and
THE LAKE SUPERIOR IRON CO.,
Defendants in Error.

ERROR TO THE SUPREME COURT OF MICHIGAN.

IN EQUITY.

Separate Brief for Plaintiff in Error.

ALFRED RUSSELL, OF COUNSEL, DETROIT, MICH.

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1. This is a bill in equity, filed in the Circuit Court for the County of Marquette, Michigan. That court made a decree dismissing the bill, which decree was affirmed by the Supreme Court of Michigan.

2. The object of the bill is to determine titles under federal grants of land bordering on an inland lake in Northern Michigan, and to obtain a decree making an equitable division of the lake bed. The lake has been drained by the parties in order to reach extremely valuable ore underneath. The appellant and the two appellees own all the land around the lake by grants from the general government.

3. It would seem self-evident that a Federal Court has jurisdiction (if the question is properly presented) to construe a federal grant, as a case arising under the laws of the United States. I so advised when the case was first presented to me by Mr. Clark, by correspondence. A case in equity, says Chief Justice

Marshall, arises under the laws of the United States, and under the twenty-fifth section of the Judiciary Act, when a correct decision depends upon a construction of the grant.

Cohens vs. Virginia, 6 Wheat., 264, 379.

"The case arises emphatically. The Act of Congress is its foundation. The contract would never have been made but under the authority of that act."

Osborn vs. U. S. Bank, 9 Wheat., 738, 824.

When it appears that the claim of the plaintiff will be defeated by one construction of United States law, or sustained by the opposite construction, then the case is one arising under the laws of the United States.

Starin vs. N. Y., 115 U. S., 248, 257.

Federal courts must construe grants of the general government without reference to rules of construction adopted by the states.

Parker vs. Bird, 137 U. S., 661.

Questions of title to land derived from the United States are to be determined by the construction of the laws of the United States.

Wilcox vs. Jackson, 13 Pet., 517.
Wis. Cent. R. Co. vs. Wis. P. Land Co., 71 Wis., 99.

If, then, the federal question is presented by the pleadings, and was passed on, adversely to the plaintiff in error, by the court below, this court has jurisdiction to review.

4. The pleadings in the case at bar exhibit the federal question plainly. Paragraph V. of the bill sets out the title of the plaintiff in error from the United States.

Record, p. 5, pp. 30 to 33, Patents.

Paragraph VII. of the bill, also, very fully alleges ownership of the land, under the water, by virtue of the United States patent.

Record, pp. 10, 11; Map Ex. A to bill.
Ex. F of Plaintiff's evidence, pp. 40, 41 of Record.

The defendant, Lake Superior Iron Company, in paragraphs 6 and 7 of its answer, denies that the complainant (plaintiff in error), is the owner of the land to the center of the lake, or is entitled to any such portion of its bed as it claims, or is the owner of any portion of the bed of said lake in Section 10.

The answer of the Cleveland Iron Mining Company, paragraph 4, sets out the construction of the grant which is claimed by said company very fully.

Record, p. 23.

Accordingly, beyond controversy, the following federal question is presented on the pleadings. Whether the plaintiff in error owns the submerged land to the center of the lake (about 36 acres), under its abutting grants from the United States; and whether the defendants own the same submerged land, which would be included if the lines of the defendants' fractional grants from the United States were fully extended into the water.

5. Also, the decision below exhibits the same federal question. The court below passed on the question of the title of plaintiff in error, derived from the United States; and Chief Justice Grant distinctly declares that plaintiff in error has no title to the land claimed by it under the water as appurtenant to the frontage of its grant derived from the United States.

The Chief Justice said: "The Cleveland Iron Mining Company claimed title by virtue of the original patent. Complainant (plaintiff in error) owned no specific piece of land north of the section line, even on its own theory, which could be measured by metes and bounds."

76 N. W., 403, 2d column, below middle.
Record, p. 262, middle.

The court is speaking of the submerged land in dispute, which was north of that line, and denies its ownership by the plaintiff in error.

P. & L. A. Co. vs. L. S. Co., 76 N. W., 395, 403.

Defendants in error do indeed argue that the court below disposed of the case wholly on the ground of estoppel, under the drainage contract between the parties (which will be referred to later); but the contention of the plaintiff in error is, that it was impossible to reach the question of estoppel without passing on the question of title to the submerged land under the United States grants, and that the chief justice of Michigan did distinctly pass upon that question of title, as above shown.

See petition for writ of error, Record, p. 265.

6. The court below held: "Complainant (plaintiff in error) owned no specific piece of the (submerged) land north of the section line." This was the very point in controversy. The whole object of the bill was to make specific that land under the water belonging to the plaintiff—to make it "specific" by determining its boundaries under a finding by a court of equity. But the Court below held, substantially, that, the boundaries of our submerged land being in doubt, we had no title to any submerged land at all.

7. Numerous cases, analogous to the present, and some on all-fours with it, have been decided by this court. I refer to some of those which have been brought here, under the twenty-fifth section, from the highest courts of the states.

In 1868, in the Supreme Court of Minnesota, the question was whether a government grant of land in that state, bounded by the Mississippi, included certain submerged land; and this court exercised jurisdiction to review the decision below, and without objection.

R. R. Co. vs. Schurmeier, 7 Wall., 272.

In 1890, in the Supreme Court of California, the question was whether land, patented by the United States, bordering on the Sacramento river, included an island opposite in the stream; and this court reviewed the case, also without objection to the jurisdiction.

Packer vs. Bird, 137 U. S., 661.

In 1891, in the Supreme Court of California, there was a question whether the land derived from the general government

extended below high water mark on San Francisco Bay. This court took jurisdiction to review, also without objection, and reversed the court below.

Knight vs. U. S. Land Assn., 142 U. S., 161.

In 1893, the Supreme Court of Oregon dealt with a conflict as to title to lands derived from the United States, below high water mark in the Columbia River. The judgment of that court against the validity of the claim of the party appealing to the court went upon the ground that the grant from the United States to him passed no title in lands below high water mark. The appellee contended, in this court, that the question presented here was merely the construction of the grant, and was the same as if the grant had been from a private person and not from the United States. This court held that the Oregon Court had adjudicated directly against a right claimed under a law of the United States, and that this ruling presented a federal question, clearly within the appellate jurisdiction of this court.

Shively vs. Bowlby, 152 U. S., 1.

Upon these authorities the present case is manifestly within the jurisdiction of this court.

8. But the appellees insist that the court below based its decision upon an independent ground, broad enough to maintain the decree dismissing the bill, irrespective of any federal question, namely, estoppel, said to arise from the joint contract of the appellant and appellees concerning the drainage of the lake, which contract is now claimed by appellees not to be a drainage contract pure and simple as appellant contends, but to be an agreement for the division of the lake bed, and therefore operating as an estoppel on appellant.

The appellant argued below that (1) there could be no such thing as conveyance of title by estoppel, under the Michigan decisions and statute of frauds; and (2) that, under the Michigan mining statute, there could be no conveyance of thirty acres of submerged ore land belonging to appellant without a vote of three-fifths in interest of the entire stock of the appellant company at a meeting called for the purpose.

The court below replied to this argument in substance that the Michigan decisions against conveyance of title by estoppel, and also the Michigan statute against conveyance by any less authority than a three-fifths vote, had no application;—for the reason that appellant had no title whatever to the submerged 30 acres (derived from the United States) which could be the subject of conveyance by estoppel or by a three-fifths vote of stockholders.

So that the doctrine of estoppel, as applied by the court below, was based wholly upon the holding of that court that appellant had no ownership whatever of the submerged land by reason of its grant from the general government. The court could not, and did not, reach the question of estoppel except by first deciding the question of title under the federal grant adversely to plaintiff in error.

76 N. W., p. 396, headnote 4; also p 403, 2d column, below middle.

It is thus plainly apparent that the alleged independent ground of estoppel necessarily involved, and rested upon, the decision that the appellant had no title at all to the submerged territory as a part of its ground patented by the United States.

9. The holding of the court below that appellant had no title to the submerged 30 acres appurtenant to the upland bought by its grantors from the general government, was clearly erroneous under the decisions of this court.

By those decisions, appellant owns to the center of the lake. The government sells its lands according to the dry acreage, charging only for that, and running meander lines simply to fix the amount of dry acreage to be paid for, and not for the purpose of limiting title of the grantee by the meander lines as boundary lines.

This court declares that by common law fresh water inland lakes belong to the owners of the soil adjacent, who own usque ad filum aquae.

Hardin vs. Jordan, 140 U. S., 371.

Such is also the law of the State of Michigan.

G. Rapids Co. vs. S. G. Rapids Co., 102 Mich., 227.

Such is also the doctrine of the New York Court of Appeals.

Gouverneur vs. Ice Co., 134 N. Y., 355.

On p. 402 of 140 U. S., this court says:

"If there should arise any question between the plaintiff, or "other riparian owners of lands situate on the margin of the "lake, as to the convergence of the side lines of the plaintiff's "land in the lake, it can be disposed of by the parties themselves "by a resort to equity."

The appellant "resorted to equity" by the present bill for this very purpose of determining the convergence of the side lines of its "land in the lake," and thus fixing the boundaries of its ownership of its submerged land.

See, also,

Railroad vs. Schurmeier, 7 Wall., 272.
Barney vs. Keokuk, 94 U. S., 324.
Grand Rapids Co. vs. S. G. R. Co., 102 Mich., 227.

In the Grand Rapids case, the Michigan Supreme Court followed this court in the above case of Hardin vs. Jordan, 140 U. S., 371, and overruled its decision in the previous case of Clute vs. Fisher, 65 Mich.

The Grand Rapids case was, like the present, a controversy between riparian owners on an inland lake in Michigan, as to their respective rights to the lands under water. The plaintiff contended that it had ownership of the bed of the lake within the lines of its fractional subdivision extended into the water. The defendant claimed that its title ran to the middle line of the lake, the submerged land to be divided proportionately to the extent of its shore line, and equitably with regard to its neighbors' claims. The defendant's claim was sustained, and Clute vs. Fisher, 65 Mich., 48, was overruled.

In that overruled case, Clute's claim that he owned the soil under the water which would be included by fully extending the lines of his fractional subdivision of shore, had been sustained.

This overruled decision, Clute vs. Fisher, is what the appellees in the case at bar claim to be the law governing the present case!

In a leading Michigan case, a bill was filed to determine the boundary lines between adjoining riparian owners on the waters

of Green Bay, Lake Michigan. The court below dismissed the bill. The Supreme Court of Michigan reversed the decree, and ordered a decree for complainant,—further proof to be taken if necessary as to the details of division. This resulted in the parties coming together as to the division. This Court should do the same thing here, and doubtless then the parties will agree on the details of division. The Michigan court followed the rule of measurements and decision laid down by Mr. Justice Gray in the Massachusetts case of Wonson vs. Wonson, 14 Allen, 83.

Blodgett Lumber Co. vs. Peters, 87 Mich., 498.

10. The appellant in the present case certainly had the title to this disputed submerged territory; and it had filled in a part of it and occupied it with buildings. The Cleveland Company, one of the appellees, expended a large sum in explorations upon the same territory and took out much ore, and made a profit of over $100,000 beyond expense. The following case is a direct authority in this court that appellant has a right to demand from the appellee, the Cleveland Company, the value of the ore taken by it from the disputed tract.

Schraeder M. Co. vs. Packer, 129 U. S., 688.

But appellant offered, at the hearing, to consent that the Cleveland Company might retain this. An instance in principle directly in point, is found in a case I argued in this court, where, by such consent, improvements were taken as an equivalent for back rents, without an accounting.

Allore vs. Jewell, 94 U. S., 506, 512, bottom.

As to the other appellee, the Lake Superior Company, appellant offered to repay to it all its expenditures upon the disputed territory, concerning which (if parties cannot agree), a reference may properly be ordered.

11. As to Mutual Mistake and Estoppel. In the short period of time between the two cases of Clute and the Grand Rapids Company, all the parties to this suit, by agreement, drained the lake at their joint expense;—they all then supposing the law of the state to be what was held in Clute's case. In like manner, all

parties supposing that case to be the law, explored the disputed territory and operated thereon.

The drainage contract was executed under this mistake of law which is to be treated, in equity, as a mistake of fact. In the maxim, "Ignorantia juris haud excusat," the word "jus" signifies the ordinary law of the country. Accordingly, that maxim does not apply where the word "jus" denotes a private right. Private right of ownership is a matter of fact; and where parties contract concerning it under a mistaken view of the law, that error is treated as a matter of fact, and not of law.

Cooper vs. Phibbs, L. R., 2 H. L., 170.
Renaud vs. Clink, 91 Mich., 3.

In Story's Equity, Sec. 130, it is said that where a party acts or agrees, in ignorance of any title in himself, this amounts to a mistake of fact.

See, also,

2 Pomeroy's Eq., Sec. 849.
Wilson vs. Life Co., 60 Md., 157.
Lansdowne vs. Id., 2 Jac. & W., 205.
Reynall vs. Sprye, 8 Hare, 222.
Blakeman vs. Id., 39 Conn., 320.
McCulloch vs. Wellington, 21 Hun., 5.
Hinkley vs. Crouse, 125 N. Y., 930.

The Michigan Supreme Court, in a case where it was claimed by defendant (as it is here) that a division line had been agreed on, and marked, and possession exercised accordingly,—but in ignorance of the law, i. e., private title (p. 556)—held that there was no estoppel against plaintiff's asserting title.

Wilson vs. Hoffman, 70 Mich., 552; see p. 556, Finding No. 17.

So, estoppel cannot arise from such a mistake as above.

The drainage contract was not made to settle any question of boundary, title, or riparian rights. It was entered into *diverso intuitu*. It is wholly silent as to any question of title, or of riparian rights, or of interlocking boundaries.

The reason of this was that all parties were laboring under the mistake that, under Clute vs. Fisher, they possessed no appur-

tenant riparian rights, but only their subdivisions squared out under the water.

An agreement, to operate as an estoppel as to boundary, must have been made for the express purpose of fixing that boundary.

Jones vs. Pashby, 67 Mich., 459, 462.

In the absence of such an agreement, occupancy or improvements will not preclude.

Chipman vs. Crooks, 41 Mich., 595.
Cronin vs. Gore, 38 Mich., 381, 385.

The testimony of Mr. Alfred Kidder and the other witnesses to the point shows that at the date of the drainage contract, they considered all questions of riparian rights put at rest by the Clute decision; and upon that mistaken view of the law appellant removed its buildings from that part of the disputed submerged territory which it had filled in and built upon.

But this court has itself made a holding which is decisive on this very point of mutual mistake and estoppel, taken by appellees and sustained by the court below.

Schraeder M. Co. vs. Packer, 129 U. S., 688.

This court held that consent to mark a boundary line, in ignorance of the facts (and private title is, as shown above, a fact), does not estop when the mistake is discovered; nor can the party cutting timber on the disputed tract, up to the mistaken boundary line, be protected as a licensee from the other party. This court in so holding unanimously followed the decision of a great judge, Mr. Justice Gibson, in Pennsylvania.

Perkins vs. Gay, 3 S. & R., 327, 331.

See, also, to the same effect,

Hatfield vs. Workman, 35 W. Va., 578, 585.

In a notable case in Massachusetts, parties intending to establish the true line, agreed on it by parol. It was not, in fact, the true line, but they held possession according to it, and one of the parties, being about to sell to the defendant, stated to the purchaser that the agreed line was correct and that he (one of the parties), did not claim beyond it. The purchaser then bought,

and made improvements next to the agreed line, with the knowledge of the adjoining owner, who was present and repeatedly pointed out the line, and gave no notice of any claim. He subsequently discovered the true line, and that it extended beyond the improvements; and the court held him entitled to remain.

Brewer vs. B. & W. R., 5 Metc., 478.

But, further, it is the doctrine of this court that there can be no equitable estoppel (such as is claimed by appellees from the drainage contract), to prevent the appellant from asserting its title to 30 acres of the bed of the lake in front of its land bought from the United States), where no element of fraud or deception appears; and in the present case, all three parties, appellant and the two appellees, acted in perfect good faith, relying on the overruled case of Clute vs. Fisher.

Henshaw vs. Bissell, 18 Wall., 255, 271.
Brant vs. Va. Coal Co., 93 U. S., 326, 336.

Also; this court has held that there can be no estoppel where all the facts were equally known to both parties, which is the undisputed fact in the present case.

Steel vs. Smelting Co., 106 U. S., 447, 456.

12. By the decision below the stockholders of the appellant company have been deprived of about thirty acres of mining land belonging to them in law and equity under the law of the United States and of the State of Michigan.

This court should exercise jurisdiction and should reverse the decision below, and divide up the submerged area equitably, and in substantial accordance with the principles and maps set out by complainant; the improvements of the appellee, the Cleveland Company, in that area, to be set off against its profits; and the appellee, the Lake Superior Company, to be paid by appellant for its expenditures on that area.

Or, a reference may very properly be ordered to report to this court an equitable apportionment of the submerged area, and respecting the outlay of the appellees.

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